15-1204

No.

In the Supreme Court of the United States

DAVID JENNINGS, ET AL., PETITIONERS

v.

ALEJANDRO RODRIGUEZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 8 U.S.C. 1225(b), inadmissible aliens who arrive at our Nation's borders must be detained, without a bond hearing, during proceedings to remove them from the country. Under 8 U.S.C. 1226(c), certain criminal and terrorist aliens must be detained, without a bond hearing, during removal proceedings. Under 8 U.S.C. 1226(a), other aliens may be released on bond during their removal proceedings, if the alien demonstrates that he is not a flight risk or a danger to the community. 8 C.F.R. 236.1(c)(8). Aliens detained under Section 1226(a) may receive additional bond hearings if circumstances have changed materially. 8 C.F.R. 1003.19(e). The questions presented are:

1. Whether aliens seeking admission to the United States who are subject to mandatory detention under Section 1225(b) must be afforded bond hearings, with the possibility of release into the United States, if detention lasts six months.

2. Whether criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.

3. Whether, in bond hearings for aliens detained for six months under Sections 1225(b), 1226(c), or 1226(a), the alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or a danger to the community; whether the length of the alien's detention must be weighed in favor of release; and whether new bond hearings must be afforded automatically every six months.

PARTIES TO THE PROCEEDING

Petitioners were appellants and cross-appellees in the court of appeals. They are: David Jennings, in his official capacity as the Field Office Director of the Los Angeles District of Immigration and Customs Enforcement (ICE); Jeh Johnson, in his official capacity as the Secretary of Homeland Security; Loretta E. Lynch, in her official capacity as the Attorney General of the United States; Gabriel Valdez, in his official capacity as the Assistant Field Office Director of the Los Angeles District of ICE; Rodney Penner, in his official capacity as the Captain of Mira Loma Detention Center; Sandra Hutchens, in her official capacity as Sheriff of Orange County; Officer Arturo Trevino, in his official capacity as the Officer-in-Charge of the Theo Lacy Facility; Captain Davis Nighswonger, in his official capacity as Commander of the Theo Lacy Facility; Captain Mike Kreuger, in his official capacity as Operations Manager, James A. Musick Facility; Arthur Edwards, in his official capacity as Officer-in-Charge, Santa Ana City Jail; Russell Davis, in his official capacity as Jail Administrator, Santa Ana City Jail; Juan P. Osuna, in his official capacity as Director, Executive Office for Immigration Review.*

Respondents were appellees and cross-appellants in the court of appeals. They are Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, and Abel Perez Ruelas, for themselves and on behalf of a class of similarly situated individuals.

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* David Jennings, Gabriel Valdez, and Officer Arturo Trevino, are substituted for their predecessors, Timothy Robbins, Wesley Lee, and Officer Nguyen. See S. Ct. Rule 35.3.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-59a) is reported at 804 F.3d 1060. An earlier opinion of the court of appeals affirming a preliminary injunction (App., *infra*, 60a-100a) is reported at 715 F.3d 1127. An opinion of the court of appeals reversing the denial of class certification (App., *infra*, 101a-138a) is reported at 591 F.3d 1105. The permanent injunction order of the district court (App., *infra*, 139a-148a) is not published in the *Federal Supplement* but is available at 2013 WL 5229795.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 2015. On January 21, 2016, Justice

Kennedy extended the time within which to file a petition for a writ of certiorari to and including February 25, 2016. On February 16, 2016, Justice Kennedy further extended the time to March 26, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 149a-164a.

STATEMENT

A. Legal Framework

This Court has "long recognized [that] the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). Pursuant to that power, Congress has enacted a multifaceted framework governing detention of aliens by the Department of Homeland Security (DHS) during proceedings to determine whether they should be excluded or removed from this country. Three provisions are relevant here: 8 U.S.C. 1225(b) governs detention of aliens who arrive at our Nation's borders; 8 U.S.C. 1226(c) governs detention of certain criminal and terrorist aliens; and 8 U.S.C. 1226(a) governs detention of other aliens who are already present in this country.

1. Detention of inadmissible aliens who are seeking admission to the United States is generally mandatory during their removal proceedings. See 1 Charles R. Gordon et al., *Immigration Law and Procedure* § 8.09[1] (2015). Congress has provided that "[a]ll" applicants for admission "shall be inspected by immigration officers." 8 U.S.C. 1225(a)(3). When a DHS immigration officer determines that an alien "who is arriving in the United States" lacks travel documents or is attempting to enter through fraud or misrepresentation, the officer generally "shall order the alien removed from the United States without further hearing," a process known as expedited removal. 8 U.S.C. 1225(b)(1)(A)(i); see 8 U.S.C. 1182(a)(6)(C) and (7); see also 8 U.S.C. 1225(b)(1)(A)(iii) (certain additional aliens, who recently arrived, may be designated for expedited removal); 69 Fed. Reg. 48,880 (Aug. 11, 2004) (same). If the alien indicates an intention to apply for asylum or asserts a fear of persecution, a DHS asylum officer must determine whether the alien has a credible fear. 8 U.S.C. 1225(b)(1)(A)(ii) and (B); 8 C.F.R. 208.30, 235.3(b)(4). The alien "shall be detained pending a final determination of credible fear of persecution." 8 U.S.C. 1225(b)(1)(B)(iii)(IV). If the alien lacks (or never asserts) a credible fear, he "shall be detained" until removed. *Ibid.* If he has a credible fear, he "shall be detained for further consideration of the application for asylum." 8 U.S.C. 1225(b)(1)(B)(ii).

Furthermore, if an immigration officer determines that an "applicant for admission" who is "seeking admission" is not subject to expedited removal but is "not clearly and beyond a doubt entitled to be admitted," the alien "shall be detained" for removal proceedings instituted before an immigration judge in the

Department of Justice. 8 U.S.C. 1225(b)(2)(A), 1229a. As part of those removal proceedings, the alien may seek asylum or various other forms of protection. *E.g.*, 8 U.S.C. 1158(a)(1).

Aliens detained under Section 1225(b) may be released into the interior of the United States during their removal proceedings only through the exercise of the Secretary of Homeland Security's discretionary parole authority. The Secretary "may," "in his discretion" and under statutory criteria, "parole into the United States temporarily" an applicant for admission. 8 U.S.C. 1182(d)(5)(A) and (B). Parole is committed to the Secretary's discretion, see *ibid.*, and DHS regulations and directives guide its exercise for aliens detained under Section 1225(b). See 8 C.F.R. 212.5(b), 235.3(b)(2)(iii), (b)(4), and (c); see also U.S. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, Directive No. 11002.1 (Dec. 8, 2009) (parole guidelines for arriving aliens with a credible fear of persecution).[1] Because the release of such aliens is governed by the Secretary's parole authority, immigration judges "may not" hold hearings to determine whether an arriving alien should be released on bond during removal proceedings. 8 C.F.R. 1003.19(h)(2)(i)(B).

2. Section 1226(c) mandates detention of certain criminal and terrorist aliens in removal proceedings. It directs that DHS "shall take into custody" aliens who are convicted of certain crimes or have engaged in certain terrorist activities. 8 U.S.C. 1226(c)(1). An alien detained under Section 1226(c) is given notice of

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[1] https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

and an opportunity to challenge the basis for that classification before an immigration judge. See 8 C.F.R. 1003.19(h)(2)(ii); *In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). If Section 1226(c) applies, the Secretary "may release" such an alien during his removal proceedings "only if" release is "necessary" for witness-protection purposes and "the alien satisfies the [Secretary]" that he "will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding." 8 U.S.C. 1226(c)(2). This Court sustained Section 1226(c)'s mandatory detention requirement against a due process challenge in *Demore* v. *Kim*, 538 U.S. 510 (2003).

3. Section 1226(a) otherwise generally governs the detention of aliens who are present in the United States and are in removal proceedings. Section 1226(a) provides that aliens "may" be detained during removal proceedings, and that the Secretary "may release" such aliens on bond or conditional parole. 8 U.S.C. 1226(a)(2)(A).

DHS regulations provide that a DHS immigration officer "may, in [his] discretion," release an alien detained under Section 1226(a) on bond if the alien "demonstrate[s] to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding." 8 C.F.R. 236.1(c)(8). An alien in turn may, "at any time" during removal proceedings, ask an immigration judge for a redetermination of his bond. *Reno* v. *Flores*, 507 U.S. 292, 309 (1993); see 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). At that bond hearing, the burden is on the alien to demonstrate that he does not present a flight risk or danger. *Ibid.*; see *In re*

Guerra, 24 I. & N. Dec. 37, 40 (B.I.A. 2006); *In re Adeniji*, 22 I. & N. Dec. 1102, 1111-1113 (B.I.A. 1999).

The alien may appeal the immigration judge's decision regarding bond to the Board of Immigration Appeals (BIA). 8 C.F.R. 236.1(d)(3)(i). An alien also may, at any time, ask an immigration judge to redetermine his bond, by "showing that [his] circumstances have changed materially since the prior bond redetermination." 8 C.F.R. 1003.19(e); see *In re Uluocha*, 20 I. & N. Dec. 133, 134 (B.I.A. 1989) (an alien "is not limited to only one bond reduction request").

B. Facts And Procedural History

In May 2007, respondents initiated this habeas corpus class action on behalf of themselves and other aliens in removal proceedings who are detained by DHS in the Central District of California. App., *infra*, 4a. Respondents contended that class members are entitled to bond hearings before an immigration judge once they have been detained for longer than six months. The district court initially declined to certify a class, but the Ninth Circuit reversed. *Ibid.*; see *id.* at 101a-138a. On remand, the district court certified a class of all aliens within that district who are detained for "longer t an six months" during ongoing removal proceedings, are not detained pursuant to a national security detention statute, 8 U.S.C. 1226a, 1531-1537, and have not been afforded a bond hearing. App., *infra*, 5a. The court also divided the class into subclasses, corresponding to the statutes under which class members are detained: 8 U.S.C. 1225(b), 1226(c), and 1226(a).[2]

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[2] The district court created a subclass for class members detained under 8 U.S.C. 1231(a), which governs detention of aliens

The district court entered a preliminary injunction. App., *infra*, 147a-148a. It required DHS to provide bond hearings to aliens detained for six months under Section 1225(b), as well as criminal aliens detained for six months under Section 1226(c). *Ibid.*; see *id.* at 6a. The Ninth Circuit affirmed the preliminary injunction. *Id.* at 6a.; see *id.* at 60a-100a.

The district court then granted summary judgment to respondents and entered a permanent injunction. App., *infra*, 139a-148a. The permanent injunction requires DHS to provide any class member who is detained for six months or more with a bond hearing before an immigration judge. *Id.* at 3a-4a; see *id.* at 144a. It further requires those bond hearings to satisfy certain procedural requirements, including that "[t]he government must prove by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond." *Id.* at 142a. The injunction the district court entered did not direct immigration judges to modify the factors they consider in bond hearings, or mandate that bond hearings be provided automatically every six months. See *id.* at 143a-145a.

The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-59a. In affirming, the court did not attempt to square the requirement of bond hearings at the six-month mark with the text of Sections 1225(b), 1226(c), 1226(a), or any relevant regulation. The court instead relied solely on the canon of

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against whom a final order of removal has been entered. See *Zadvydas* v. *Davis*, 533 U.S. 678, 682 (2001). The court of appeals held that this subclass "does not exist" because aliens detained under Section 1231(a) are no longer in ongoing removal proceedings. App., *infra*, 51a.

constitutional avoidance, reasoning that "prolonged" detention under any of those statutes would give rise to serious constitutional doubt, that Congress would have wanted to avoid these doubts by implicitly limiting detention without bond to a "reasonable time," and concluding that detention becomes unreasonable "at the six-month mark." *Id.* at 13a; see *id.* at 32a-35a (discussing Section 1226(c)); *id.* at 39a-45a (Section 1225(b)); *id.* at 46a-48a (Section 1226(a)).

The court of appeals also revised the procedures applicable in a bond hearing. Whereas 8 C.F.R. 1003.19(e) provides that aliens who have already had one bond hearing may obtain another hearing if they show that circumstances have changed materially, the court of appeals concluded that all class members—including aliens detained for more than six months after a prior bond hearing under Section 1226(a)—"are entitled to automatic bond hearings after six months of detention." App., *infra*, 48a. The court further concluded that, in all *Rodriguez* bond hearings, the alien is entitled to be released unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or danger to the community. *Id.* at 49a-50a; see *Singh* v. *Holder*, 638 F.3d 1196, 1203-1204 (9th Cir. 2011).

The court of appeals reversed the district court's decision not to revise the factors immigration judges must consider in bond hearings. App., *infra*, 56a-57a. The court of appeals held that immigration judges "must consider" as a factor "the length of time for which a noncitizen has already been detained." *Ibid.* And the court of appeals held that "the government must provide periodic bond hearings every six months." *Id.* at 57a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is fundamentally wrong in numerous respects and conflicts with decisions of this Court and other courts of appeals. Review by this Court is warranted.

The Ninth Circuit has rewritten the statutory and regulatory framework governing detention of aliens in removal proceedings. It has replaced Congress's carefully tailored statutory regime with a rigid, one-size-fits-all rule that every alien in detention during ongoing removal proceedings—including inadmissible aliens arriving for the first time at our Nation's borders and criminals or terrorists who are in mandatory detention under Section 1226(c)—must receive a bond hearing automatically after six months, and with it the prospect of release into the United States. The court of appeals then went even further and rewrote the procedures that apply in bond hearings. Federal regulations unambiguously provide that, even when an alien is detained under Section 1226(a) and thus may obtain bond, "the alien" must demonstrate that he is *not* a flight risk or a danger to the community, and may obtain a new bond hearing only by showing a material change in circumstances. 8 C.F.R. 236.1(c)(8), 1003.19(e). The court has turned that scheme on its head, requiring the *government* to prove—*by clear and convincing evidence*—that the alien is a flight risk or a danger to the community, and requiring such bond hearings to occur automatically every six months, no matter what. And the court imposed those requirements on the detention of aliens under 8 U.S.C. 1225(b) and 1226(c), even though those statutory provisions and implementing regulations do not provide for bond hearings *at all*.

The court of appeals' wholesale revision of the law governing detention of aliens during removal proceedings oversteps the proper judicial role and has no basis in the underlying statutes and regulations. It conflicts with this Court's longstanding rule that the political Branches of the federal government have plenary control over which aliens may physically enter the United States and under what circumstances. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). It conflicts with this Court's holding in *Demore* v. *Kim*, 538 U.S. 510 (2003), that it is constitutional to detain criminal or terrorist aliens under Section 1226(c), without bond hearings, during removal proceedings. *Id.* at 531. Indeed, the alien in *Demore* was detained "for six months." *Ibid.* And it conflicts with decisions of other courts of appeals regarding whether Section 1226(c) authorizes detention of criminal and terrorist aliens, without a bond hearing and the prospect of release, for more than six months.

The court of appeals' rulings have serious practical repercussions. The court's rulings are contrary to the political Branch's judgments regarding the need for the detention of arriving aliens and criminal and terrorist aliens. In addition, the court's requirement of automatic bond hearings by the six-month mark creates a powerful incentive for aliens subject to mandatory detention under Sections 1225(b) and 1226(c) to delay their removal proceedings in order to obtain a bond hearing—and possible release—that they otherwise could not receive. And the court's shifting and heightening of the burden of proof represents a radical departure from regulations that have governed such hearings for decades.

The consequences are particularly vivid for inadmissible aliens who are arriving at our borders for the first time, and who are subject to mandatory detention under Section 1225(b). As a practical matter, DHS would often be unable to demonstrate by clear and convincing evidence that such a person is a flight risk or danger: DHS often knows little or nothing about such a person beyond the fact that he or she has arrived and lacks valid documentation. The court's legal rule thus creates an incentive for people to make a potentially life-threatening trip to this country, to abuse our legal process to obtain entry into the United States, and then to disappear rather than appear at any removal proceedings.

The Ninth Circuit's decision also impedes DHS's efforts to pursue its highest enforcement priorities, which include securing the border and removing serious criminals. The court of appeals' categorical six-month rule hinders DHS's pursuit of its mission by taking control of the border out of DHS's hands and preventing DHS from detaining criminal aliens for the time necessary to secure their removal. This Court should grant certiorari and reverse.

I. THE COURT OF APPEALS' DECISION IS WRONG

The court of appeals plainly erred in rewriting a series of federal immigration laws and regulations. It erred in imposing a regime of bond hearings by the six-month mark for aliens detained under Section 1225(b); it erred in imposing the same rigid regime for criminal and terrorist aliens detained under Section 1226(c); and it erred in rewriting the procedures that apply in all bond hearings, including for aliens detained under Section 1226(a) who have already had bond hearings.

A. Section 1225(b) Does Not Impose A Six-Month Limit On Mandatory Detention Of Aliens

1. Mandatory detention under Section 1225(b) is not limited to six months. This Court has "long recognized [that] the power to expel or exclude aliens [i]s a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Mezei*, 345 U.S. at 210). "[T]he Court's general reaffirmations of this principle have been legion." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 & n.6 (1972) (collecting cases). "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896); *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 308 (1993).

The authority of the political Branches is particularly strong—and countervailing constitutional interests are particularly faint—with respect to control of the Nation's borders as to aliens who stand "on the threshold of initial entry." *Mezei*, 345 U.S. at 212; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."). For such aliens at the threshold, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)).

In *Mezei*, for example, this Court upheld the indefinite detention of a lawful permanent resident alien at the border for 21 months, without any kind of hearing, as he sought to return to the United States after a nearly two-year trip abroad. 345 U.S. at 207. This Court squarely rejected the proposition that his "continued exclusion deprives him of any statutory or constitutional right," *id.* at 215, and distinguished *Mezei*'s "clear break" in "continuous residence" from a mere "temporary absence," where some kind of hearing may be required for a lawful permanent resident. *Id.* at 213-214. *Mezei* drew spirited dissents, but the dissenters did not dispute that the alien could be held, without bond, during the period needed to effectuate his exclusion. Rather, they disagreed with the government's decision, on national security grounds, not to provide Mezei notice of or opportunity to challenge the basis for his exclusion. See *id.* at 218 (Black, J., dissenting) (calling for "a fair open court hearing in which evidence is appraised by the court"); *id.* at 227 (Jackson, J., dissenting) (Mezei should "be informed of [the] grounds [for detention] and have a fair chance to overcome them").

Consistent with this long and unbroken legal tradition, Congress has provided that an inadmissible alien arriving in or seeking admission to the United States "shall be detained" during proceedings to remove the alien from the country. 8 U.S.C. 1225(b)(1)(B)(ii), (iii)(IV), and (b)(2). An immigration judge "may not" hold a hearing to determine whether an arriving alien in removal proceedings should be released on bond. 8 C.F.R. 1003.19(h)(2)(i)(B). Congress has instead vested the Secretary with discretion to decide whether to release the alien on parole. 8 U.S.C. 1182(d)(5); see 8

C.F.R. 235.3(c). As a result, the Executive retains plenary control over the border and physical entry of aliens into the interior. But aliens in such detention have notice of and an opportunity to dispute the basis for their exclusions: aliens detained under Section 1225(b)(1) who establish a credible fear, and aliens detained under Section 1225(b)(2), are entitled to full removal proceedings before an immigration judge.

2. The court of appeals nonetheless held (App., *infra*, 36a-43a) that every alien detained during removal proceedings under Section 1225(b) must be given a bond hearing before an immigration judge—with the possibility of release into the interior over DHS's objection—if detention lasts for six months. The court did not even attempt to square its interpretation with the statutory text. Instead, the court rested its holding exclusively on the canon of constitutional avoidance. See *id.* at 39a-45a. The court's decision is wrong and conflicts with the long-established principle, embodied in Section 1225(b) and confirmed by *Mezei*, that the political Branches have plenary control over protection of our Nation's borders.

At the outset, the court's ruling flouts Section 1225(b)'s plain text. The canon of constitutional avoidance is "'a tool for choosing between competing plausible interpretations of a provision'"; "[i]t 'has no application' in the interpretation of an unambiguous statute." *McFadden* v. *United States*, 135 S. Ct. 2298, 2307 (2015) (quoting *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014)). Here, Congress has made it clear that aliens covered by Section 1225(b) "shall be detained" during removal proceedings, whether expedited or ordinary. 8 U.S.C. 1225(b)(1)(B)(ii), (iii)(IV), and (2)(A). The mandatory "shall" in Section 1225(b)

contrasts with the discretionary "may" in Section 1226(a), which allows for bond hearings before an immigration judge. 8 U.S.C. 1226(a)(2)(A). And nothing in Section 1225(b) can be read to suggest a time limit on mandatory detention during removal proceedings—much less a rigid six-month cap. Detention under Section 1225(b) ends when removal proceedings end. In the meantime, parole is the exclusive mechanism for releasing aliens into the interior—and parole is committed to the Secretary's unreviewable discretion. See 8 U.S.C. 1182(d)(5).

The court of appeals was also wrong to suggest that the Executive's plenary control of the border with respect to aliens on the threshold of entry presents serious constitutional problems that Congress would have wanted to avoid. Indeed, the court itself recognized (App., *infra*, 41a) that Section 1225(b) is clearly valid as applied to any alien seeking initial entry—and that this is "likely the vast majority" of class members. *Id.* at 86a. The court nonetheless invoked constitutional avoidance to require bond hearings at the six-month mark for *every* alien detained under Section 1225(b), solely because of the possibility that a lawful permanent resident returning from abroad *could* be detained as an "arriving alien" for more than six months. See *id.* at 43a ("The question * * * is whether 'one possible application of [a] statute raises constitutional concerns.'" (citation omitted)); *id.* at 86a (same).

The court of appeals' reasoning is deeply flawed. In the first place, Mezei himself was a lawful permanent resident returning from an extended trip abroad, yet this Court sustained his detention. *Mezei*, 345 U.S. at 214-216. The possibility that the statute

might be applied to a lawful permanent resident thus furnished no basis for the court of appeals to impose a categorical six-month limit on mandatory detention for all aliens detained under Section 1225(b).

Indeed, respondents have not identified a single class member who is a lawful permanent resident detained for six months under Section 1225(b). App., *infra*, 40a. In fact, lawful permanent residents should never be detained under Section 1225(b)(1). Federal regulations provide that a verified lawful permanent resident "shall not" be detained under that provision, 8 C.F.R. 235.3(b)(5)(ii), and if a lawful permanent resident is detained by mistake he or she can challenge that through appeal or habeas corpus. 8 U.S.C. 1225(b)(1)(C), 1252(e)(2)(C); 8 C.F.R. 235.6(a)(2)(ii). And lawful permanent residents should rarely be detained for six months under Section 1225(b)(2), which covers "applicant[s] for admission" who are seeking admission to the country. 8 U.S.C. 1225(b)(2). Congress has provided that lawful permanent residents generally "shall not be regarded" as applicants for admission. 8 U.S.C. 1101(a)(13)(C). A lawful permanent resident is an applicant for admission only if the government proves, by clear and convincing evidence, that he has been outside the country for more than 180 continuous days; "abandoned or relinquished" his lawful status; "engaged in illegal activity after having departed the United States"; departed the country during removal proceedings; has committed a criminal offense serious enough to render him inadmissible; or attempted to enter outside a designated port of entry. *Ibid.*; see *In re Rivens*, 25 I. & N. Dec. 623, 625 (B.I.A. 2011).

Congress has thus plainly provided that a lawful permanent resident who seeks to enter following travel abroad under these narrow circumstances faces "denial of reentry" and treatment as a new entrant who must seek admission. *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484-1485 (2012). Congress's judgment that a lawful permanent resident should be "assimilate[d] to th[e] status" of a new entrant in these circumstances, and thus may be detained on the authority of *Mezei*, 345 U.S. at 214, warrants great deference. And in the rare situation in which a lawful permanent resident is detained under Section 1225(b)(2) for six months, he would be in ongoing removal proceedings and thus would have the procedural protections available in those proceedings, which was the subject of the dissenters' concerns in *Mezei*.

The court of appeals thus applied the canon of constitutional avoidance to avoid an issue that would rarely occur and on which Congress would be entitled to great deference, to carve a massive loophole into a statute that the court itself recognized was constitutional in every actual application thus far in this case, and to break sharply from this Court's longstanding rule that the Executive has plenary authority under the immigration laws to control the border as to aliens standing on the threshold of entry. The result is a windfall for every class member who has actually been detained for six months under Section 1225(b), who after six months gains the possibility of entering this country's interior over DHS's objection.

To be faithful to the statutory text, Congress's intent, and this Court's longstanding precedent, Section 1225(b) must be applied as written. If the situation arises in which a lawful permanent resident is de-

tained for a prolonged period under Section 1225(b)(2) in a way that *Mezei* does not squarely control, that the Secretary does not address through the exercise of his parole authority, and that raises a constitutional issue, that case would be properly resolved in an as-applied challenge under the Due Process Clause, taking into account the unusual circumstances of that particular case.

3. The court of appeals' requirement that aliens detained under Section 1225(b) receive a bond hearing by the six-month mark is not only profoundly wrong, it also creates perverse incentives for aliens to delay their removal proceedings. Under the court of appeals' rigid six-month rule, an alien can achieve a windfall through dilatory and obstructive tactics: As long as detention lasts for six months—even when the delay is due to the alien's own actions—the alien obtains a bond hearing, and with it the possibility of release into the United States.

Aliens desiring to do so will often be able to ensure that their removal proceedings last for six months. An immigration judge will grant a continuance to an alien in removal proceedings "for good cause shown." 8 C.F.R. 1003.29. Moreover, the Ninth Circuit has repeatedly required immigration judges to grant multiple continuances to aliens, which can last months at a time. *E.g.*, *Montes-Lopez* v. *Holder*, 694 F.3d 1085, 1087 (2012) (reversing denial of third continuance, where immigration judge "warned" that the second "would be [the] last"); *Ahmed* v. *Holder*, 569 F.3d 1009, 1012 (2009) (collecting cases and reversing denial of a second six-month continuance); *Martinez-Guzman* v. *Holder*, 356 Fed. Appx. 985, 987 (2009) (reversing denial of a motion for a fifth continuance;

government failed to identify a "specific inconvenience"); *Ordonez-Garay* v. *Mukasey*, 290 Fed. Appx. 988, 990 (2008) ("A motion for a continuance * * * cannot be denied solely on the basis of expediency.").

Shifting the burden of proof to DHS and imposing the heightened standard of proof by clear-and-convincing evidence make the practical problem much worse. Under the court of appeals' ruling, an alien detained under Section 1225(b) would be able to enter the interior if his removal proceedings last for six months, unless DHS can demonstrate by clear and convincing evidence that the alien is a flight risk or a danger. App., *infra*, 3a-4a. But DHS knows little or nothing about many aliens detained under Section 1225(b)—"likely the vast majority" of whom are inadmissible aliens arriving for the first time at our borders, *id.* at 86a—beyond the fact that he or she lacks valid travel documentation or sought admission through fraud. The result is that many aliens would attain something close to a legal entitlement to be released into the interior of the United States—over the objections of DHS—by virtue of an information asymmetry. Congress would never enact such a huge loophole in the Executive's control of our Nation's borders, and it did not do so in Section 1225(b).

B. Section 1226(c) Does Not Impose A Six-Month Limit On Mandatory Detention Of Criminal Or Terrorist Aliens

1. The court of appeals further erred in holding that mandatory detention of criminal and terrorist aliens under Section 1226(c) automatically terminates after six months. Section 1226(c) unambiguously provides that detention of the covered criminal or terrorist aliens is mandatory while removal proceed-

ings are ongoing, 8 U.S.C. 1226(c)(1), and that DHS "may release" such a criminal or terrorist "only if" it is necessary for witness-protection purposes and "the alien satisfies the [Secretary]" that he is not a flight risk or danger to the community. 8 U.S.C. 1226(c)(2).[3] "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) (citation omitted). There is no such evidence of contrary legislative intent here. Section 1226(c) thus unambiguously forecloses the court's addition of a new, unwritten exception allowing release at the six-month mark.

The court of appeals' six-month rule also conflicts with this Court's decision in *Demore*, which rejected a due process challenge to the detention of a lawful permanent resident under Section 1226(c) during his removal proceedings. 538 U.S. at 531. *Demore* leaves no room for the view that Section 1226(c) itself mandates a bond hearing by the six-month mark—or that the detention of a criminal or terrorist alien for six months without a bond hearing gives rise to a serious constitutional problem that Congress implicitly avoided: The alien in *Demore* was himself detained "for six months" without a bond hearing. *Ibid.*

The court of appeals' reliance on *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), to support its imposition of a flat six-month limit on mandatory detention also con-

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[3] The class definition here excludes aliens detained under national-security detention statutes. App., *infra*, 5a-6a; see 8 U.S.C. 1226a and 1531-1537. Terrorists may also be detained under Section 1226(c) itself. *E.g.*, *Hussain* v. *Gonzales*, 492 F. Supp. 2d 1024, 1033 (E.D. Wis. 2007).

flicts with *Demore*. *Demore* itself distinguished *Zadvydas*, explaining that the detention of aliens after entry of a final order of removal is "materially different" from detention during ongoing removal proceedings. *Demore*, 538 U.S. at 527. First, the detention in *Zadvydas* no longer "serve[d] its purported immigration purpose" of effectuating removal, because removal was "no longer practically attainable." *Ibid.* (quoting *Zadvydas*, 533 U.S. at 690). Indeed, other countries had refused to accept the aliens in *Zadvydas*, so there was no country to which to return them. See 533 U.S. at 684, 702. By contrast, the Court in *Demore* concluded, detention of aliens "*pending their removal proceedings* * * * necessarily serves the purpose of preventing [them] from fleeing prior to or during their removal proceedings." 538 U.S. at 527-528. Second, the detention in *Zadvydas* "ha[d] no obvious termination point" and thus was "indefinite" and "potentially permanent." *Id.* at 528-529 (quoting *Zadvydas*, 533 U.S. at 690-691, 697). In contrast, the Court explained, "*detention pending a determination of removability*" has an "obvious termination point": entry of a final order of removal. *Id.* at 529 (quoting *Zadvydas*, 533 U.S. at 697) (emphasis in *Demore*).

To be sure, this Court described the "period necessary for * * * removal proceedings" as "brief," and stated that it ordinarily lasts a "very limited time," pointing to evidence that the average time in proceedings before an immigration judge was 47 days, with an average of four additional months if an alien appealed. *Demore*, 538 U.S. at 513, 529 & n.12. But that does not mean that Congress—without mentioning it—intended to terminate mandatory detention and instead to require bond hearings after six months, or

that detention under Section 1226(c) categorically becomes constitutionally doubtful at that point. This Court sustained the alien's detention for more than "six months" in *Demore*, and noted that he "had requested a continuance of his removal hearing" to obtain documents to assist his defense. *Id.* at 531 & n.15. The Court also recognized that requiring detention during an alien's appeal to the BIA "may deter aliens from exercising their right to do so," but explained that "'the legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow.'" *Id.* at 530 n.14 (quoting *McGautha* v. *California*, 402 U.S. 183, 213 (1971)).

Under *Demore*, criminal or terrorist aliens detained under Section 1226(c) thus make litigation choices in light of the possibility that seeking continuances, relief from removal, or appellate review will extend the duration of their removal proceedings and thereby extend the period of their detention. The court of appeals' flat six-month limit conflicts with *Demore*'s response to that practical reality, and instead gives criminals and terrorists an incentive to delay and to file appeals they otherwise would not take: they obtain a bond hearing, with a presumptive prospect of release. The Third and Sixth Circuits have rejected the Ninth Circuit's rigid six-month rule in part because of this concern. See *Chavez-Alvarez* v. *Warden York Cnty. Prison*, 783 F.3d 469, 476 (3d Cir. 2015) ("aliens who are merely gaming the system to delay their removal should not be rewarded with a bond hearing that they would not otherwise get under the statute"); *Ly* v. *Hansen*, 351 F.3d 263, 272 (6th Cir. 2003) (cautioning against rewarding aliens who "raise frivolous objections and string out the proceed-

ings"); cf. *Barker* v. *Wingo*, 407 U.S. 514, 522-531 (1972) (rejecting a "rigid" time requirement for what constitutes a speedy trial, and instead requiring balancing of factors, including the reasons for delay and whether it is "attributable to the defendant").

The court of appeals' six-month rule also cannot be squared with Justice Kennedy's concurrence in *Demore*. Justice Kennedy joined the majority opinion but further explained that, in his view, a lawful permanent resident "could be entitled" to a bond hearing "if the continued detention became unreasonable or unjustified." 538 U.S. at 532. Like the majority, however, he viewed reasonableness of continuing detention as depending not on its duration, but on its justification. If there were an "unreasonable delay *by the INS* in pursuing and completing deportation proceedings," he explained, it "could become necessary" to ask whether "the detention is not to facilitate deportation, or to protect against risk of flight or dangerousness, *but to incarcerate for other reasons*." *Id.* at 532-533 (emphases added). This rationale forecloses a bright-line six-month cap, whether as a matter of due process or of statutory construction. When delay is caused *by the alien*, for example, the alien's detention continues to be justified by the interests in "protect[ing] against risk of flight or dangerousness." *Ibid.*

2. A requirement that aliens detained under Section 1226(c) must be given bond hearings by the six-month mark also causes the very harms Congress enacted Section 1226(c) to prevent. Congress mandated detention of criminal and terrorist aliens during removal proceedings in reaction to evidence that the prior scheme—under which criminal aliens obtained

bond hearings before immigration judges—led to "wholesale failure." *Demore*, 538 U.S. at 518. One study showed that, "after criminal aliens were identified as deportable, 77% were arrested at least once more and 45%—nearly half—were arrested multiple times before their deportation proceedings even began." *Ibid.* And even when immigration judges concluded that criminal aliens were *not* flight risks and thus could be released on bond, "more than 20% of deportable criminal aliens failed to appear for their removal hearings." *Id.* at 519. "Too often, as one frustrated INS official told [Congress], only the stupid and honest get deported." S. Rep. No. 48, 104th Cong., 1st Sess. 3 (1995). The bottom line was a "serious and growing threat to public safety." *Id.* at 1.

Congress responded by taking the determination of flight risk and danger out of immigration judges' hands. Section 1226(c) instead reflects Congress's categorical judgment that the covered criminal and terrorist aliens are inherently flight risks or dangers to the community, and thus should not be released on bond during the period necessary for their removal proceedings. See *Demore*, 538 U.S. at 518-521; cf. *Flores*, 507 U.S. at 308 (upholding detention of alien minors during removal proceedings). The court of appeals' rule that criminal and terrorist aliens detained under Section 1226(c) *must* be given bond hearings by the six-month mark thus puts immigration judges back into the position from which Congress removed them, and presents the same risks that known criminals will ultimately obtain bond and abscond or commit further crimes. Indeed, when coupled with the rule that criminal aliens are entitled to release unless the government can demonstrate by

clear and convincing evidence that they are a flight risk or danger, the court's revision of Section 1226(c) makes matters even worse.

If in an exceptional case detention of an alien during removal proceedings extends markedly beyond the norm under the circumstances without justification and becomes potentially unreasonable and arbitrary, an as-applied due process challenge may be brought in which the court can evaluate all of the relevant circumstances, while according great weight to Congress's categorical determination that detention is to be mandatory. But the Ninth Circuit had no basis to impose a rigid six-month cap.

C. The Court Of Appeals Erred In Requiring Additional Bond Hearings Automatically Every Six Months And Otherwise Rewriting The Procedures That Govern Existing Bond Hearings

The court of appeals further erred in its rewriting of the procedures that govern bond hearings, and in particular (1) requiring bond hearings for all class members automatically every six months, including for aliens detained under Section 1226(a) who have already had a bond hearing and were denied bond or failed to post bond; (2) shifting the burden of proof in such bond hearings to the government; (3) raising the standard of proof to demand clear and convincing evidence that the alien is a flight risk or danger; and (4) requiring immigration judges to consider as a factor the length of time the alien has already been detained. The court invented those rules out of whole cloth.

Congress has provided that, when an alien is detained during removal proceedings under Section 1226(a), the Secretary "may" release him on bond. 8

U.S.C. 1226(a)(2). Governing regulations in turn provide that aliens can obtain a bond hearing before an immigration judge, 8 C.F.R. 236.1(d)(1), 1231.1(d)(1), and that such aliens can subsequently obtain an additional hearing by "showing that [their] circumstances have changed materially." 8 C.F.R. 1003.19(e). These regulations are not arbitrary and capricious, and they warrant full deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984). The court of appeals provided no basis for invalidating these regulations on their face.

There is similarly no basis for the court of appeals' revision of the burden and standard of proof in bond hearings. Indeed, Section 1226(c) unambiguously forecloses the court's holding that the government must bear the burden of proving, by clear and convincing evidence, that a criminal alien is a danger or a flight risk: Congress provided that, in the "only" situation when a criminal alien may be released during removal proceedings—for witness-protection purposes—"*the alien*" must demonstrate that he is *not* a flight risk or danger to the community. 8 U.S.C. 1226(c)(2) (emphasis added). Governing regulations and BIA decisions also unambiguously foreclose the court's view regarding the burden and standard of proof in bond hearings under Section 1226(a): They provide that "*the alien* must demonstrate" that he is not a flight risk or danger to persons or property. 8 C.F.R. 236.1(c)(8), 1236.1(c)(8) (emphasis added); see *In re Guerra*, 24 I. & N. Dec. 37, 40 (B.I.A. 2006) ("The burden is on the alien."). And in *Zadvydas*, this Court similarly placed the burden on "the alien" who is subject to potentially indefinite detention following entry of a final order of removal to show "that

there is no significant likelihood of removal in the reasonably foreseeable future." 533 U.S. at 680.

Section 1226(c)(2) and federal regulations also foreclose the court's revision of the factors that immigration judges must consider in determining whether to grant bond: They unambiguously provide that release (in the narrow circumstances in which it is allowed) depends solely on whether the alien is a flight risk or danger to the community. See 8 U.S.C. 1226(c)(2); 8 C.F.R. 236.1(c)(8), 1236.1(c)(8). Forcing immigration judges also to consider the passage of time further incentivizes aliens to delay their proceedings and creates an anomalous result. As the government gets closer to removing an alien and thus its interest in detention to effectuate removal *strengthens*, the alien becomes more likely to obtain bond and thereby to thwart removal by absconding. And absconding is already a serious problem in the immigration system. The Executive Office for Immigration Review (EOIR) reports that, from fiscal years 2010 through 2014, 38,441 aliens who were released during removal proceedings—31% of the total—absconded and had orders of removal entered against them *in absentia*. Office of Planning, Analysis, & Technology, *FY 2014 Statistics Yearbook*, P3 (Mar. 2015) (*2014 Yearbook*).[4] The passage of time does nothing to mitigate that risk (or the risk that an alien will commit crimes if released).

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[4] http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

II. THE COURT OF APPEALS' DECISION IS EXTRAORDINARILY IMPORTANT AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

A. The court of appeals' ruling that all aliens arriving at our borders are entitled to a bond hearing and the prospect of release after six months—particularly when coupled with its rulings that any such alien is entitled to release unless the government demonstrates by clear and convincing evidence that the alien is a flight risk or danger—presents an issue of extraordinary importance. In conflict with *Mezei*, the court of appeals has deprived the Executive of plenary control to protect the Nation's borders by providing an avenue for inadmissible aliens who are merely "on the threshold of initial entry" to obtain release into the United States over DHS's objection. 345 U.S. at 212. That ruling is obviously significant. Hundreds of thousands of aliens arrive at our borders each year, and a significant proportion of those aliens arrive in States in the Ninth Circuit. See DHS, Office of Immigration Statistics, *2013 Yearbook of Immigration Statistics*, tbl. 35 (Aug. 2014).[5] The United States has an overriding interest in protecting its territorial sovereignty through the use of all of the tools enacted by Congress, including immigration detention, to address and diminish waves of illegal immigration. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993).

B. The court of appeals' revision of Section 1226(c) also warrants this Court's review. As set forth above,

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[5] https://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

the court of appeals' categorical ruling that mandatory detention of criminal and terrorist aliens under Section 1226(c) automatically terminates at six months, and that those aliens must be given bond hearings with the prospect of release, conflicts with this Court's decision in *Demore*.

The court of appeals' ruling also solidifies an acknowledged split of authority among the circuit courts of appeals. See *Lora* v. *Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015) (describing the split and collecting citations). The Second Circuit has recently chosen to "follow the Ninth Circuit" and adopted the "bright-line approach," requiring bond hearings by the six-month mark for aliens detained under Section 1226(c). *Lora*, 804 F.3d at 615-616.[6] By contrast, the Third and Sixth Circuits, while taking the position that detention without a bond hearing under Section 1226(c) is limited to a "reasonable" time, have squarely rejected the rigid six-month rule and instead assess reasonableness based on a case-specific balancing inquiry. See *Ly*, 351 F.3d at 271-273 (rejecting a "bright-line time limitation"); *Diop* v. *ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011) ("We decline to establish a universal point at which detention will always be considered unreasonable."); see also *Leslie* v. *Attorney Gen. of U.S.*, 678 F.3d 265, 269 (3d Cir. 2012) (discussing "[t]he fact-dependent inquiry"); *Chavez-Alvarez*, 783 F.3d at 474 ("By its very nature, the use of a balancing framework makes any determination on reasonableness highly fact-specific."). The

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[6] Simultaneously with filing this petition, the government is filing a petition for a writ of certiorari seeking review of *Lora* and requesting that the *Lora* petition be held pending the disposition of this case.

injunction affirmed by the Ninth Circuit here thus would have been reversed in the Third or Sixth Circuits.

This Court's review is warranted to resolve this circuit split. As it stands, criminal and terrorist aliens who are otherwise identically situated will automatically get bond hearings and the prospect of release by the six-month mark (and automatically every six months after that) if they are detained in the Second or Ninth Circuits; perhaps receive such hearings at some later time if they are detained in the Third or Sixth Circuits, depending on whether their detention has become unreasonable on case-specific facts; or remain subject to the mandatory detention Section 1226(c) prescribes and not receive a bond hearing during ongoing removal proceedings, if they are detained in another circuit. This divide thus leads to the disparate treatment of otherwise similarly-situated aliens. Whether a person is detained for the duration of his removal proceedings, without bond, should not depend on whether he or she happens to be in immigration proceedings in New York City or across the river in New Jersey.

The practical impact of this divide is serious. The Second and Ninth Circuits account for a significant proportion of this country's total immigration court docket. See *2014 Yearbook* W2 (caseload by immigration court). In those circuits, criminal aliens who Congress categorically determined were too dangerous and too likely to abscond even to be afforded bond hearings will nonetheless have bond hearings and the prospect of entitlement to release, and, given the Ninth Circuit's burden-of-proof rule, many actually will be released. See Resp. C.A. Br. 22 ("[F]rom Oc-

tober 2012 to April 2014, approximately 70% of class members were granted bond at their hearings, and approximately 70% of those individuals posted bond and were released."). It is a statistical certainty, moreover, that some of those criminal aliens will abscond and that some will commit further crimes that detention would have prevented. See *Demore*, 538 U.S. at 518 (citing statistical evidence of recidivism and flight).

C. The court of appeals' wholesale revisions to the procedures that apply in bond hearings also warrant this Court's review, as they greatly exacerbate the damage caused by the court's revision of the statutes and regulations governing the duration of mandatory detention. They dramatically increase the likelihood that inadmissible aliens arriving for the first time at our borders, known criminals, and other aliens who are flight risks or dangers to the community will nonetheless be released into the United States. For example, DHS will often be unable to show by clear and convincing evidence that an inadmissible alien newly arriving at our Nation's doorstep is a flight risk or danger.

These rulings also have significant operational consequences. EOIR reports that, even without being required to give new bond hearings automatically every six months to all aliens in removal proceedings, immigration judges redetermined bond 321,886 times in fiscal years 2010 through 2014, for an average of approximately 64,000 hearings per year. *2014 Yearbook* A8. The Ninth Circuit's rulings have significantly increased immigration judges' caseload, forcing the limited number of immigration judges to divert time and attention to *Rodriguez* bond hearings—rather

than adjudicating whether aliens are actually removable. The process of deciding immigration cases thus will take longer, potentially leading to even more aliens becoming entitled to *Rodriguez* hearings (and in turn obtaining release) under the court's erroneous revision of the immigration laws and regulations.

More broadly, the court of appeals' rulings impede DHS's pursuit of its highest enforcement priorities. The Secretary has directed DHS to focus its limited enforcement resources, "to the greatest degree possible," on removing aliens who are serious criminals or threats to the national security, and securing the border by removing aliens who have recently crossed illegally. Memorandum from Jeh C. Johnson, Sec'y of DHS, *Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* 1-3, 5 (Nov. 20, 2014);[7] see Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, H.R. 2029, Div. F, Tit. II, 114th Cong., 1st Sess. 256 (prioritizing removal of serious criminals). The court of appeals' decision directly interferes with those efforts. First, it impedes DHS's ability to control the Nation's borders: When inadmissible aliens seek to enter the United States, DHS will no longer be able to detain them for as long as needed to effectuate their removal. Instead, DHS will face an arbitrary six-month cap on mandatory detention of arriving aliens under Section 1225(b). The Ninth Circuit has thus taken out of DHS's hands the decision whether an alien should be permitted to enter the interior, instead handing that decision to an immigration judge and requiring DHS to provide clear and convincing evidence to prevent his release. And the

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[7] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

court's six-month rule creates incentives for aliens to attempt an illegal entry and, if caught, to delay proceedings long enough to obtain via a bond hearing the possibility of release into the interior—the very thing they sought, and Congress sought in Section 1225(b) to prevent—when they illegally attempted to enter in the first place.

Second, the court of appeals' decision impedes DHS's ability to remove serious criminals. It prevents DHS from detaining criminal aliens under Section 1226(c) for as long as needed to effectuate their removal; it creates an incentive for aliens detained under Section 1226(c) to delay removal proceedings; and it gives criminal aliens an entitlement to be released—and thus the ability to abscond or commit further crimes—unless DHS can make a heightened evidentiary showing. The Ninth Circuit's rulings thus cut to the heart of DHS's primary mission in enforcing the immigration laws, in contravention of the governing laws and regulations and this Court's precedents.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MARCH 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 13-56706 and 13-56755
D.C. No. 2:07-cv-03239-TJH-RNB

ALEJANDRO RODRIGUEZ; ABDIRIZAK ADEN FARAH; JOSE FARIAS CORNEJO; YUSSUF ABDIKADIR; ABEL PEREZ RUELAS, FOR THEMSELVES AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED INDIVIDUALS, PETITIONERS-APPELLEES/CROSS-APPELLANTS

AND

EFREN OROZCO, PETITIONER

v.

TIMOTHY ROBBINS, FIELD OFFICE DIRECTOR, LOS ANGELES DISTRICT, IMMIGRATION AND CUSTOMS ENFORCEMENT; JEH JOHNSON, SECRETARY, HOMELAND SECURITY; LORETTA E. LYNCH, ATTORNEY GENERAL; WESLEY LEE, ASSISTANT FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT; RODNEY PENNER, CAPTAIN, MIRA LOMA DETENTION CENTER; SANDRA HUTCHENS, SHERIFF OF ORANGE COUNTY; NGUYEN, OFFICER, OFFICER-IN-CHARGE, THEO LACY FACILITY; DAVIS NIGHSWONGER, CAPTAIN, COMMANDER, THEO LACY FACILITY; MIKE KREUGER, CAPTAIN, OPERATIONS MANAGER, JAMES A. MUSICK FACILITY; ARTHUR EDWARDS, OFFICER-IN-CHARGE, SANTA ANA CITY JAIL; RUSSELL DAVIS, JAIL ADMINISTRATOR, SANTA

ANA CITY JAIL; JUAN P. OSUNA,* DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, RESPONDENTS-APPELLANTS/CROSS-APPELLEES

Argued and Submitted:
July 24, 2015—Pasadena, California
Filed: Oct. 28, 2015

OPINION

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Senior District Judge, Presiding

Before: KIM MCLANE WARDLAW and RONALD M. GOULD, Circuit Judges and SAM E. HADDON,** District Judge.

WARDLAW, Circuit Judge:

This is the latest decision in our decade-long examination of civil, i.e. non-punitive and merely preventative, detention in the immigration context. As we noted in our prior decision in this case, *Rodriguez v. Robbins* (*Rodri-*

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* Juan P. Osuna is substituted for his predecessor, Thomas G. Snow, as Director, Executive Office for Immigration Review, pursuant to Federal Rule of Appellate Procedure 43(c).

** The Honorable Sam E. Haddon, District Judge for the U.S. District Court for the District of Montana, sitting by designation.

guez II), 715 F.3d 1127 (9th Cir. 2013), thousands of immigrants to the United States are locked up at any given time, awaiting the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. In 2014, U.S. Immigration and Customs Enforcement ("ICE") removed 315,943 individuals, many of whom were detained during the removal process.[1] According to the most recently available statistics, ICE detains more than 429,000 individuals over the course of a year, with roughly 33,000 individuals in detention on any given day.[2]

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, Abel Perez Ruelas, and Efren Orozco ("petitioners") represent a certified class of noncitizens who challenge their prolonged detention pursuant to 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a) without individualized bond hearings and determinations to justify their continued detention. Their case is now on appeal for the third time. After a three-judge panel of our court reversed the district court's denial of petitioners' motion for class certification, and after our decision affirming the district court's entry of a preliminary injunction, the district court granted summary judgment to the class and entered a permanent injunction. Under the

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[1] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Report 7 (2014), https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf.

[2] U.S. Immigration and Customs Enforcement, ERO Facts and Statistics 3 (2011), http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

permanent injunction, the government must provide any class member who is subject to "prolonged detention"—six months or more—with a bond hearing before an Immigration Judge ("IJ"). At that hearing, the government must prove by clear and convincing evidence that the detainee is a flight risk or a danger to the community to justify the denial of bond. The government appeals from that judgment. We affirm in part and reverse in part.

I. Background

On May 16, 2007, Alejandro Garcia commenced this case by filing a petition for a writ of habeas corpus in the Central District of California. Garcia's case was consolidated with a similar case filed by Alejandro Rodriguez, and the petitioners moved for class certification. The motion was denied on March 21, 2008.

A three-judge panel of our court reversed the district court's order denying class certification.[3] *Rodriguez I*, 591 F.3d 1105. We held that the proposed class satisfied each requirement of Federal Rule of Civil Procedure 23: The government conceded that the class was sufficiently numerous; each class member's claim turned on the common question of whether detention for more than six months without a bond hearing raises serious constitutional concerns; Rodriguez's claims were sufficiently typ-

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[3] Judge Betty Binns Fletcher was on the panel as originally constituted and authored the opinion in *Rodriguez v. Hayes* (*Rodriguez I*), 578 F.3d 1032 (9th Cir. 2009), *amended by* 591 F.3d 1105 (9th Cir. 2010). Judge Wardlaw was selected by random draw to replace Judge B. Fletcher on the panel following her death in 2012.

ical of the class's because "the determination of whether [he] is *entitled* to a bond hearing will rest largely on interpretation of the statute authorizing his detention"; and Rodriguez, through his counsel, adequately represented the class. *Id.* at 1122-25. The panel also noted that "any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class" could be addressed through "the formation of subclasses." *Id.* at 1123.

The government petitioned our court for panel rehearing or rehearing en banc. In response, the panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") does not bar certification of the class and, with that amendment, unanimously voted to deny the government's petition. The full court was advised of the suggestion for rehearing en banc, and no judge requested a vote on whether to rehear the matter. *See* Fed. R. App. P. 35. The government did not file a petition for certiorari in the United States Supreme Court.

On remand, the district court certified a class defined as:

> all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a

hearing to determine whether their detention is justified.

The district court also approved the proposed subclasses, which correspond to the four statutes under which the class members are detained—8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and 1231(a). The class does not include suspected terrorists, who are detained pursuant to 8 U.S.C. § 1537. Additionally, because the class is defined as non-citizens who are detained "pending completion of removal proceedings," it excludes any detainee subject to a final order of removal.

On September 13, 2012, the district court entered a preliminary injunction that applied to class members detained pursuant to two of these four "general immigration detention statutes"—§§ 1225(b) and 1226(c). Under the preliminary injunction, the government was required to "provide each [detainee] with a bond hearing" before an IJ and to "release each Subclass member on reasonable conditions of supervision ... unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."

The government appealed, and on April 16, 2013, we affirmed. *See Rodriguez II*, 715 F.3d 1127. We applied the Court's preliminary injunction standard set forth in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), which requires the petitioner to "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and

that an injunction is in the public interest." *Rodriguez II*, 715 F.3d at 1133.

Evaluating petitioners' likelihood of success on the merits, we began with the premise that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Id.* at 1134 (alterations in original) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). "Thus, the Supreme Court has held that the indefinite detention of a once-admitted alien 'would raise serious constitutional concerns.'" *Id.* (quoting *Zadvydas*, 533 U.S. at 682).

Addressing those concerns, we recognized that we were not writing on a clean slate: "[I]n a series of decisions since 2001, 'the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing.'" *Id.* (quoting *Rodriguez I*, 591 F.3d at 1114). First, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court resolved statutory and due process challenges to indefinite detention under 8 U.S.C. § 1231(a)(6), which governs detention beyond the ninety-day removal period, where removal was not practicable—for one petitioner because he was stateless, and for another because his home country had no repatriation treaty with the United States. *See id.* at 684-86. Drawing on civil commitment jurisprudence, the Court reasoned:

> A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to "depriv[e]" any "person . . . of . . . liberty . . . without due process of law." Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects. *See Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). And this Court has said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, *see United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987), or, in certain special and "narrow" nonpunitive "circumstances," *Foucha*, *supra*, at 80, 112 S. Ct. 1780, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical restraint." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

Id. at 690 (alterations in original). To avoid those "serious constitutional concerns," the Court held that § 1231(a)(6) does not authorize indefinite detention without a bond hearing. *Id.* at 682, 699. Noting that the "proceedings at issue here are civil, not criminal," *id.* at 690, the Court "construe[d] the statute to contain an implicit 'reasonable time' limitation," *id.* at 682, and recognized six months as a "presumptively reasonable period of detention," *id.* at 701.

Although in dissent, Justice Kennedy, joined by Chief Justice Rehnquist, disagreed with the majority's application of the canon of constitutional avoidance and argued that the holding would improperly interfere with international repatriation negotiations, Justice Kennedy recognized that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 721. Justice Kennedy further noted that although the government may detain non-citizens "when necessary to avoid the risk of flight or danger to the community," due process requires "adequate procedures to review their cases, allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large." *Id.*

Second, in *Demore v. Kim*, 538 U.S. 510 (2003), the Court addressed a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. *Id.* at 517-18. After discussing Congress's reasons for establishing mandatory detention, namely, high rates of crime and flight by removable non-citizens, *id.* at 518-21, the Court affirmed its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *id.* at 526. Distinguishing *Zadvydas*, the Court in *Demore* stressed that detention under § 1226(c) has "a definite termination point" and typically "lasts for less than the 90 days we considered presumptively valid in *Zadvydas*." *Id.* at 529. Although the Court therefore upheld mandatory deten-

tion under § 1226(c), Justice Kennedy's concurring opinion, which created the majority, reasoned that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532.

After *Zadvydas* and *Demore*, our court decided several cases that provided further guidance for our analysis in *Rodriguez II*. In *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), we held that the constitutionality of detaining a lawful permanent resident under § 1226(c) for over 32 months was "doubtful." *Id.* at 1242. "To avoid deciding the constitutional issue, we interpret[ed] the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens" and held that "[t]wo years and eight months of process is not expeditious." *Id.* We therefore remanded Tijani's habeas petition to the district court with directions to grant the writ unless the government provided a bond hearing before an IJ within sixty days. *Id.*

We next considered civil detention in the immigration context in *Casas-Castrillon v. Department of Homeland Security* (*Casas*), 535 F.3d 942 (9th Cir. 2008). There, a lawful permanent resident who had been detained for nearly seven years under § 1226(c) and then § 1226(a) sought habeas relief while his petition for review of his removal order was pending before our court. *Id.* at 944-48. Applying *Demore*, we reasoned that § 1226(c) "authorize[s] mandatory detention only for the 'limited period of [the non-citizen's] removal proceedings,' which

the Court estimated 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal' his removal order to the [Board of Immigration Appeals ("BIA")]." *Id.* at 950 (quoting *Demore*, 538 U.S. at 529). We therefore concluded that § 1226(c)'s mandatory detention provision applies only during administrative removal proceedings—i.e. until the BIA affirms a removal order. *Id.* at 951. From that point until the circuit court has "rejected [the applicant's] final petition for review or his time to seek such review expires," the government has discretionary authority to detain the noncitizen pursuant to § 1226(a). *Id.* at 948. We noted, however, that "[t]here is a difference between detention being authorized and being necessary as to any particular person." *Id.* at 949. Because the Court's holding in *Demore* turned on the brevity of mandatory detention under § 1226(c), we concluded that "the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." *Id.* at 949.

Soon after, in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), we clarified the procedural requirements for bond hearings held pursuant to our decision in *Casas* ("*Casas* hearings"). In light of "the substantial liberty interest at stake," we held that "due process requires a contemporaneous record of *Casas* hearings," and that the government bears the burden of proving "by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond." *Id.* at 1203, 1208.

To evaluate whether the government has met its burden, we instructed IJs to consider the factors set forth in *In re Guerra*, 24 I. & N. Dec. 37 (BIA 2006), in particular "the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses." *Singh*, 638 F.3d at 1206 (quoting *Guerra*, 24 I. & N. Dec. at 40).

Finally, in *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081 (9th Cir. 2011), we extended the procedural protections established in *Casas* to individuals detained under § 1231(a)(6). *Id.* at 1086. We held that "prolonged detention under § 1231(a)(6), without adequate procedural protections," like prolonged detention under § 1226(a), "would raise 'serious constitutional concerns.'" *Id.* (quoting *Casas*, 535 F.3d at 950). To address those concerns, we held that "an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." *Id.* at 1092.

In *Diouf II*, we also adopted a definition of "prolonged" detention—detention that "has lasted six months and is expected to continue more than minimally beyond six months"—for purposes of administering the *Casas* bond hearing requirement. *Id.* at 1092 n.13. We reasoned that:

> When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of

> an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.

Id. at 1091-92.

Applying these precedents to *Rodriguez* class members detained under § 1226(c), which requires civil detention of non-citizens previously convicted of certain crimes who have already served their state or federal periods of incarceration, we have concluded that "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." *Rodriguez II*, 715 F.3d at 1137 (quoting *Casas*, 535 F.3d at 951). To avoid these constitutional concerns, we held that "§ 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation, the application of which is subject to federal-court review.'" *Id.* at 1138 (quoting *Zadvydas*, 533 U.S. at 682). "[W]hen detention becomes prolonged," i.e., at the six-month mark, "§ 1226(c) becomes inapplicable"; the government's authority to detain the noncitizen shifts to § 1226(a), which provides for discretionary detention; and detainees are then entitled to bond hearings. *Id.*

In so holding, we rejected the government's attempt to distinguish *Casas* on the basis that "*Casas* concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA," whereas this case involves "aliens awaiting the

conclusion of their initial administrative proceedings." *Id.* at 1139. We found that this argument reflected "a distinction without a difference": "'Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention.'" *Id.* (quoting *Diouf II*, 634 F.3d at 1087).

We also noted that our conclusion was consistent with the decisions of the two other circuits that have directly addressed this issue. In *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011), the Third Circuit, applying the canon of constitutional avoidance, construed § 1226(c) to"authorize[] detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community." *Id.* at 231. Applying that holding to the facts of the case, the Third Circuit held that the petitioner's detention, which had lasted nearly three years, "was unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause." *Id.* at 233. Although the court declined to adopt a categorical definition of a "reasonable amount of time" to detain a non-citizen without a bond hearing, it read *Demore* as we do—to connect the constitutionality of detention to its length and to authorize detention only for a "limited time." *Id.* at 233-34.

Likewise, in *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003), the Sixth Circuit held that, to avoid a constitutional problem, removable non-citizens may be detained under

§ 1226(c) only "for a reasonable period of time required to initiate and conclude removal proceedings promptly." *Id.* at 273. Finding that the petitioner's 500-day-long detention was "unreasonable," the Sixth Circuit affirmed the district court's grant of a writ of habeas corpus. *Id.* at 265, 271. While maintaining that a "bright-line time limitation, as imposed in *Zadvydas*, would not be appropriate for the pre-removal period," the court recognized that *Demore*'s holding "rel[ies] on the fact that Kim, and persons like him, will normally have their proceedings completed within a short period of time and will actually be deported, or will be released." *Id.* at 271.

As to the *Rodriguez* subclass detained under § 1225(b), we found "no basis for distinguishing between" noncitizens detained under that section and under § 1226(c). *Rodriguez II*, 715 F.3d at 1143. The cases relied upon by the government for the proposition that arriving aliens are entitled to lesser due process protections—namely, *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) and *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc)—were decided under pre-IIRIRA law and, as such, were inapposite. *Id.* at 1140-41. We therefore held that "to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited." *Id.* at 1144. As we had with § 1226(c), we explained that "the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the noncitizen would shift to § 1226(a), which is discretionary and

which we have already held requires a bond hearing." *Id.* (citing *Casas*, 535 F.3d at 948).

After establishing that class members detained under § 1226(c) and § 1225(b) are entitled to bond hearings after six months of detention, we clarified that the procedural requirements set forth in *Singh* apply to those hearings. *Id.* at 1139, 1144 (citing *Singh*, 638 F.3d at 1203). These requirements include proceedings before "a neutral IJ" at which "the government bear[s] the burden of proof by clear and convincing evidence," *id.* at 1144 (citing *Singh*, 638 F.3d at 1203-04), a lower burden of proof than that required to sustain a criminal charge.

Having found that the class was likely to succeed on the merits, we turned to the other preliminary injunction factors. We found that the class members "clearly face irreparable harm in the absence of the preliminary injunction" because "the deprivation of constitutional rights unquestionably constitutes irreparable injury." *Id.* (citations omitted). The preliminary injunction safeguards constitutional rights by ensuring that "individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained." *Id.* at 1145. Similarly, we found that the balance of equities favored the class members because "needless prolonged detention" imposes "major hardship," whereas the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns." *Id.* Finally, we held that the preliminary injunction was consistent with the public

interest, which is "implicated when a constitutional right has been violated," and "benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions." *Id.* at 1146. We therefore affirmed the district court's order.

During the pendency of *Rodriguez II*, the parties conducted discovery, and class counsel adduced extensive evidence detailing the circumstances under which class members are detained. The parties then filed cross-motions for summary judgment, and the petitioners moved for a permanent injunction to extend and expand the preliminary injunction.

On August 6, 2013, after we issued our decision in *Rodriguez II*, the district court granted summary judgment to the class members and entered a permanent injunction. The permanent injunction applies to class members detained under any of the four civil "general immigration detention statutes"—§§ 1225(b), 1226(a), 1226(c), and 1231(a)—and requires the government to provide each detainee with a bond hearing by his 195th day of detention. Applying our decisions in *Casas*, *Singh*, and *Rodriguez II*, the district court further ordered that bond hearings occur automatically, that detainees receive "comprehendible notice," that the government bear the burden of proving "by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond," and that hearings are recorded. However, the district court declined to order IJs to consider the length of detention or the likelihood of re-

moval during bond hearings, or to provide periodic hearings for detainees who are not released after their first hearing.

The government now appeals from the entry of the permanent injunction, arguing that the district court—and we—erred in applying the canon of constitutional avoidance to each of the statutes at issue. Relying on the Supreme Court's decisions in *Zadvydas* and *Demore*, the government argues that none of the subclasses are categorically entitled to bond hearings after six months of detention. Accordingly, the government contends that we should decertify the class and instead permit as-applied challenges to individual instances of prolonged detention, which could occur only through habeas proceedings. Petitioners counter that *Rodriguez II* is the law of the case and law of the circuit, requiring us to affirm the permanent injunction as to the § 1225(b) and § 1226(c) subclasses, and that non-citizens detained pursuant to § 1226(a) and § 1231(a) are entitled to bond hearings for reasons similar to those discussed in *Rodriguez II*. Petitioners cross-appeal the district court's order as to the procedural requirements for bond hearings; they argue that the district court erred in declining to require that IJs consider the likelihood of removal and the total length of detention, and in declining to require that non-citizens detained for twelve or more months receive periodic bond hearings every six months.

II. Nature of Civil Immigration Detention

Class members spend, on average, 404 days in immigration detention. Nearly half are detained for more

than one year; one in five for more than eighteen months, and one in ten for more than two years. In some cases, detention has lasted much longer: As of April 28, 2012, when the government generated data to produce to the petitioners, one class member had been detained for 1,585 days, approaching four and a half years of civil confinement.[4]

Non-citizens who vigorously pursue claims for relief from removal face substantially longer detention periods than those who concede removability. Requesting relief from an IJ increases the duration of class members' detention by an average of two months; appealing a claim to the BIA adds, on average, another four months; and appealing a BIA decision to the Ninth Circuit typically leads to an additional eleven months of confinement. Class members who persevere through this lengthy process are often successful: About 71% of class members have sought relief from removal, and roughly one-third of those individuals prevailed. However, many detainees choose to give up meritorious claims and voluntarily leave the country instead of enduring years of immigration detention awaiting a judicial finding of their lawful status.

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[4] The government challenges the accuracy of these figures, which are drawn from petitioners' expert report, based on disagreements with that expert's methodology. Using the government's preferred data set and process generates an average detention length of 347 days and a range of 180 to 1,037 days of civil detention for each non-citizen. Under either set of figures, typical class members are detained for well over 180 days. The differences in precise numbers are not material to our decision.

Class members frequently have strong ties to this country: Many immigrated to the United States as children, obtained legal permanent resident status, and lived in this country for as long as twenty years before ICE initiated removal proceedings. As a result, hundreds of class members are married to U.S. citizens or lawful permanent residents, and have children who were born in this country. Further, many class members hold steady jobs—including as electricians, auto mechanics, and roofers—to provide for themselves and their families. At home, they are caregivers for young children, aging parents, and sick or disabled relatives. To the extent class members have any criminal record—and many have no criminal history whatsoever—it is often limited to minor controlled substances offenses. Accordingly, when class members do receive bond hearings, they often produce glowing letters of support from relatives, friends, employers, and clergy attesting to their character and contributions to their communities.

Prolonged detention imposes severe hardship on class members and their families. Civil immigration detainees are treated much like criminals serving time: They are typically housed in shared jail cells with no privacy and limited access to larger spaces or the outdoors. Confinement makes it more difficult to retain or meet with legal counsel, and the resources in detention facility law libraries are minimal at best, thereby compounding the challenges of navigating the complexities of immigration law and proceedings. In addition, visitation is restricted and is often no-contact, dramatically disrupting family relationships. While in detention, class members have

missed their children's births and their parents' funerals. After losing a vital source of income, class members' spouses have sought government assistance, and their children have dropped out of college.

Lead petitioner Alejandro Rodriguez's story is illustrative. Rodriguez came to the United States as an infant and has lived here continuously since then. Rodriguez is a lawful permanent resident of the United States, and his entire immediate family—including his parents, siblings, and three young children—also resides in the United States as citizens or lawful permanent residents. Before his removal proceedings began, Rodriguez worked as a dental assistant. In 2003, however, Rodriguez was convicted of possession of a controlled substance and sentenced to five years of probation and no jail time. He had one previous conviction, for "joyriding."

In 2004, ICE commenced removal proceedings and subjected Rodriguez to civil detention. An IJ determined that Rodriguez's prior conviction for "joyriding," i.e. driving a stolen vehicle, qualified as an "aggravated felony" that rendered him ineligible for relief in the form of cancellation of removal, and therefore ordered him removed. Rodriguez appealed the IJ's decision to the BIA, which affirmed, and then to the Ninth Circuit. In July 2005, a three-judge panel of our court granted the government's motion to hold Rodriguez's case in abeyance until the Supreme Court decided a related case, *Gonzales v. Penuliar*, 549 U.S. 1178 (2007), which issued eighteen months later, in January 2007. In *Penuliar*, the Supreme Court vacated our court's opinion and remanded

for further consideration in light of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), which held that violating a California statute prohibiting taking a vehicle without the owner's consent qualifies as a "theft offense." Between July 2005 and January 2007, while Rodriguez's case was in abeyance, ICE conducted four custody reviews on Rodriguez and repeatedly determined that Rodriguez was required to remain in detention until our court issued a decision on the merits of his claim. In mid-2007, about a month after Rodriguez had moved for class certification, however, ICE released him. At that point, Rodriguez had been detained for 1,189 days, roughly three years and three months. In April 2008, in the related case on remand from the Supreme Court, our court held that driving a stolen vehicle did not qualify as an aggravated felony. *Penuliar v. Mukasey*, 528 F.3d 603, 614 (9th Cir. 2008). On motion of the parties, we then remanded Rodriguez's petition to the BIA, which granted his application for cancellation of removal, vindicating his right to lawfully remain in the United States.

III. Standard of Review

"We review a grant of summary judgment *de novo*." *Pavoni v. Chrysler Grp., LLC*, 789 F.3d 1095, 1098 (9th Cir. 2015). "A permanent injunction 'involves factual, legal, and discretionary components,' so we 'review a decision to grant such relief under several different standards.'" *Vietnam Veterans of Am. v. C.I.A.*, 791 F.3d 1122, 1129 (9th Cir. 2015) (quoting *Momot v. Mastro*, 652 F.3d 982, 986 (9th Cir. 2011)). "We review legal conclusions . . . de novo, factual findings for clear error, and the scope of the injunction for abuse of discretion." *Id.*

IV. Discussion

In resolving whether the district court erred in entering the permanent injunction, we consider, first, petitioners' entitlement to bond hearings and, second, the procedural requirements for such hearings. Based on our precedents, we hold that the canon of constitutional avoidance requires us to construe the statutory scheme to provide all class members who are in prolonged detention with bond hearings at which the government bears the burden of proving by clear and convincing evidence that the class member is a danger to the community or a flight risk. However, we also conclude that individuals detained under § 1231(a) are not members of the certified class. We affirm the district court's order insofar as it requires automatic bond hearings and requires IJs to consider alternatives to detention because we presume, like the district court, that IJs are already doing so when determining whether to release a non-citizen on bond.[5] Because the same constitutional concerns arise when detention approaches another prolonged period, we

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[5] *See* 8 C.F.R. § 241.4(f) (listing factors that Department of Homeland Security ("DHS") must "weigh[] in considering whether to recommend further detention or release of a detainee," including the detainee's criminal history, evidence of recidivism or rehabilitation, ties to the United States, history of absconding or failing to appear for immigration or other proceedings, and the likelihood that the detainee will violate the conditions of release); *id.* § 1236.1(d)(1) (authorizing IJs to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released" and to "ameliorat[e] the conditions" of release imposed by DHS).

hold that IJs must provide bond hearings periodically at six month intervals for class members detained for more than twelve months. However, we reject the class's suggestion that we mandate additional procedural requirements.

A. Civil Detention

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Civil detention violates the Due Process Clause except "in certain special and narrow nonpunitive circumstances, where a special justification, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690 (citations omitted). Consistent with these principles, the Supreme Court has—outside of the immigration context—found civil detention constitutional without any individualized showing of need only when faced with the unique exigencies of global war or domestic insurrection. *See Ludecke v. Watkins*, 335 U.S. 160 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944); *Moyer v. Peabody*, 212 U.S. 78 (1909).[6] And even in those extreme circumstances, the Court's decisions have been widely criticized. *See, e.g.*, Eugene V. Rostow, *The Jap-*

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[6] For a thorough discussion of civil detention jurisprudence and its bearing on the constitutionality of civil detention in the immigration context, *see* Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 Hastings L.J. 363 (2014), and David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 Emory L.J. 1003 (2002).

anese American Cases—A Disaster, 54 Yale L.J. 489 (1945). In all contexts apart from immigration and military detention, the Court has found that the Constitution requires some individualized process and a judicial or administrative finding that a legitimate governmental interest justifies detention of the person in question.

For example, in numerous cases addressing the civil detention of mentally ill persons, the Court has consistently recognized that such commitment "constitutes a significant deprivation of liberty," and so the state "must have a constitutionally adequate purpose for the confinement." *Jones v. United States*, 463 U.S. 354, 361 (1983) (citations omitted). Further, the "nature and duration of commitment" must "bear some reasonable relation to the purpose for which the individual is committed." *Jones*, 463 U.S. at 368 (citation omitted).

Accordingly, the state may detain a criminal defendant found incapable of standing trial, but only for "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [the] capacity [to stand trial] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). At all times, the individual's "commitment must be justified by progress toward that goal." *Id.* Likewise, the state may detain a criminal defendant following an acquittal by reason of insanity in order to "treat the individual's mental illness and protect him and society from his potential dangerousness." *Jones*, 463 U.S. at 368. However, the detainee "is entitled to release when he has recovered his sanity or is no longer dangerous." *Id.*; *see also Foucha v.*

Louisiana, 504 U.S. 71, 78 (1992) ("[K]eeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness."). Further, although the state may detain sexually dangerous individuals even after they have completed their criminal sentences, such confinement must "take[] place pursuant to proper procedures and evidentiary standards." *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). To "justify indefinite involuntary commitment," the state must prove both "dangerousness" and "some additional factor, such as a 'mental illness' or 'mental abnormality.'" *Id.* at 358 (collecting cases).

Similarly, the Court has held that pretrial detention of individuals charged with "the most serious of crimes" is constitutional only because, under the Bail Reform Act, an "arrestee is entitled to a prompt detention hearing" to determine whether his confinement is necessary to prevent danger to the community. *Salerno*, 481 U.S. at 747. Further, "the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act." *Id.*; *see also Schall v. Martin*, 467 U.S. 253, 263 (1984) (upholding a statute that "permits a brief pretrial detention based on a finding of a 'serious risk' that an arrested juvenile may commit a crime before his return date").

In addition, the Court has held that incarceration of individuals held in civil contempt is consistent with due process only where the contemnor receives adequate procedural protections and the court makes specific findings

as to the individual's ability to comply with the court order. *See Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011). If compliance is impossible—for instance, if the individual lacks the financial resources to pay court-ordered child support—then contempt sanctions do not serve their purpose of coercing compliance and therefore violate the Due Process Clause. *See id.*

Early cases upholding immigration detention policies were a product of their time. *See Carlson v. Landon*, 342 U.S. 524 (1952) (McCarthy Era deportation of communists); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (removal of German enemy aliens during World War II); *Wong Wing v. United States*, 163 U.S. 228 (1896) (Chinese exclusion). Yet even these cases recognized some limits on detention of non-citizens pending removal. Such detention may not be punitive—Congress may not, for example, impose sentences of "imprisonment at hard labor" on non-citizens awaiting deportation, *Wong Wing*, 163 U.S. at 235—and it must be supported by a legitimate regulatory purpose. Under these principles, the Court authorized the "detention or temporary confinement" of Chinese-born non-citizens "pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* The Court also upheld executive detention of enemy aliens after the cessation of active hostilities because deportation is "hardly practicable" in the midst of war, and enemy aliens' "potency for mischief" continues "even when the guns are silent." *Ludecke*, 335 U.S. at 166. Similarly, the Court approved detention of communists to limit their "opportunities to hurt the United States during the pendency of deportation pro-

ceedings." *Carlson*, 342 U.S. at 538. The Court recognized, however, that "purpose to injure could not be imputed generally to all aliens subject to deportation." *Id.* at 538. Rather, if the Attorney General wished to exercise his discretion to deny bail, he was required to do so at a hearing, the results of which were subject to judicial review. *Id.* at 543.

More recently, the Supreme Court has drawn on decades of civil detention jurisprudence to hold that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas*, 533 U.S. at 690. Although the state has legitimate interests in "ensuring the appearance of aliens at future immigration proceedings" and "protecting the community," post-removal period detention does not uniformly "'bear[] [a] reasonable relation to the purpose for which the individual [was] committed.'" *Id.* (second and third alterations in original) (quoting *Jackson*, 406 U.S. at 738). To avoid constitutional concerns, the Court construed 8 U.S.C. § 1231(a)(6), the statute governing post-removal period detention, to "limit[] an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States." *Id.* at 689. Detention beyond that point requires "strong procedural protections" and a finding that the noncitizen is "specially dangerous." *Id.* at 691.

Soon after *Zadvydas*, the Court rejected a due process challenge to mandatory detention under 8 U.S.C. § 1226(c), which applies to non-citizens convicted of certain crimes. *Demore*, 538 U.S. at 517-18. While affirm-

ing its "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings," *id.* at 526, the Court emphasized that detention under § 1226(c) was constitutionally permissible because it has "a definite termination point" and typically "lasts for less than . . . 90 days," *id.* at 529.

Since *Zadvydas* and *Demore*, our court has "grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." *Rodriguez II*, 715 F.3d at 1134 (quoting *Rodriguez I*, 591 F.3d at 1114). As we recognized in *Casas*, "prolonged detention without adequate procedural protections would raise serious constitutional concerns." *Casas*, 535 F.3d at 950; *see also Rodriguez II*, 715 F.3d at 1144 (discussing "the constitutional concerns raised by prolonged mandatory detention"); *Singh*, 638 F.3d at 1208 ("The private interest here—freedom from prolonged detention—is unquestionably substantial."); *Diouf II*, 634 F.3d at 1085 ("When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required.") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). We have therefore held that non-citizens detained pursuant to § 1226(a) and § 1231(a)(6) are entitled to bond hearings before an IJ when detention becomes prolonged. *See Casas*, 535 F.3d at 949 (requiring bond hearings for individuals detained under § 1226(a)); *Diouf II*, 634 F.3d at

1084 (extending *Casas* to individuals detained under § 1231(a)(6)).

While the government falsely equates the bond hearing requirement to mandated release from detention or facial invalidation of a general detention statute, our precedents make clear that there is a distinction "between detention being authorized and being necessary as to any particular person." *Casas*, 535 F.3d at 949. Bond hearings do not restrict the government's legitimate authority to detain inadmissible or deportable non-citizens; rather, they merely require the government to "justify denial of bond" with clear and convincing "evidence that an alien is a flight risk or danger to the community." *Singh*, 638 F.3d at 1203. And, in the end, the government is required only to establish that it has a legitimate interest reasonably related to continued detention; the discretion to release a non-citizen on bond or other conditions remains soundly in the judgment of the immigration judges the Department of Justice employs.

Prior decisions have also clarified that detention becomes "prolonged" at the six-month mark. In *Zadvydas*, the Supreme Court recognized six months as a "presumptively reasonable period of detention." 533 U.S. at 701. By way of background, the Court noted that in 1996, Congress had "shorten[ed] the removal period from six months to 90 days." *Id.* at 698. The Court then explained:

> While an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it be-

> lieved that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months. Consequently, for the sake of uniform administration in the federal courts, we recognize that period.

Id. at 701 (citation omitted); *see also Clark v. Martinez*, 543 U.S. 371, 386 (2005) (applying "the 6-month presumptive detention period" the Supreme Court "prescribed in *Zadvydas*"); *cf. Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-79 (9th Cir. 2006) (discussing the Patriot Act's requirement that "detention of suspected terrorists or other threats to national security" be reviewed "at six month intervals"). Following *Zadvydas*, we have defined detention as "prolonged" when "it has lasted six months and is expected to continue more than minimally beyond six months." *Diouf II*, 634 F.3d at 1092 n.13.[7] At that point, we have explained, "the private interests at stake are profound," and "the risk of an erroneous deprivation of liberty in the absence of a hearing before a neutral decisionmaker is substantial." *Id.* at 1092.

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[7] As we noted in *Rodriguez II*, this holding does not conflict with the Supreme Court's decision in *Demore*, 538 U.S. 510, which approved only "brief period[s]" of detention without individualized determinations as to dangerousness and flight risk. *Demore*, 538 U.S. at 513, 523.

B. Entitlement to a Bond Hearing

With this well-established precedent of the Supreme Court and our Court in mind, we review the district court's grant of summary judgment and entry of a permanent injunction. We consider, in turn, whether individuals detained under §§ 1226(c), 1225(b), 1226(a), and 1231(a) are entitled to bond hearings after they have been detained for six months.

1. The § 1226(c) Subclass

Section 1226(c) requires that the Attorney General detain any non-citizen who is inadmissible or deportable because of his criminal history upon that person's release from imprisonment, pending proceedings to remove him from the United States.[8] Detention under § 1226(c) is

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[8] Mandatory detention under § 1226(c) applies to non-citizens who are inadmissible on account of having committed a crime involving moral turpitude or a controlled substance offense; having multiple criminal convictions with an aggregate sentence of five years or more of confinement; having connections to drug trafficking, prostitution, commercialized vice, money laundering, human trafficking, or terrorism; having carried out severe violations of religious freedom while serving as a foreign government official; or having been involved in serious criminal activity and asserting immunity from prosecution. It also applies to noncitizens who are deportable on account of having been convicted of two or more crimes involving moral turpitude, an aggravated felony, a controlled substance offense, certain firearm-related offenses, or certain other miscellaneous crimes; having committed a crime of moral turpitude within a certain period of time since their date of admission for which a sentence of one year or longer has been imposed; or having connections to terrorism. *See* 8 U.S.C.

mandatory. Individuals detained under that section are not eligible for release on bond or parole, *see* 8 U.S.C. § 1226(a); they may be released only if the Attorney General deems it "necessary" for witness protection purposes, *id.* § 1226(c)(2).

An individual detained under § 1226(c) may ask an IJ to reconsider whether the mandatory detention provision applies to him, *see* 8 C.F.R. § 1003.19(h)(2)(ii), but such review is limited in scope and addresses only whether the individual is properly included in a category of noncitizens subject to mandatory detention based on his criminal history. *See generally In re Joseph*, 22 I. & N. Dec. 799 (BIA 1999). At a "*Joseph* hearing," a detainee "may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the [DHS] is otherwise substantially unlikely to establish that he is in fact subject to mandatory detention." *Demore*, 538 U.S. at 514 n.3. "A determination in favor of an alien" at a *Joseph* hearing "does not lead to automatic release," *Joseph*, 22 I. & N. Dec. at 806, because the government retains discretionary authority to detain the individual under § 1226(a). Instead, such a determination allows the IJ to consider granting bond under the § 1226(a) standards, namely, whether the detainee would pose a danger or flight risk if released. *See id.*; *see also Demore*, 538 U.S. at 532 (Kennedy, J., concurring).

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§ 1226(c) (cross-referencing 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), 1227(a)(2)(B), 1227(a)(2)(C), 1227(a)(2)(D), 1227(a)(2)(A)(i), 1182(a)(3)(B), 1227(a)(4)(B)).

As a result of § 1226(c)'s mandatory language and the limited review available through a *Joseph* hearing, individuals are often detained for years without adequate process. *See, e.g.*, *Tijani*, 430 F.3d at 1242 (lawful permanent resident detained for more than two and a half years). Members of the § 1226(c) subclass also tend to be detained for longer periods than other class members: The longest-detained class member was confined for 1,585 days and counting as of April 28, 2012, and the average subclass member faces detention for 427 days. These lengthy detention times bear no relationship to the seriousness of class members' criminal history or the lengths of their previously served criminal sentences. In several instances identified by class counsel, a class member was sentenced to one to three months in prison for a minor controlled substances offense, then endured one or two *years* in immigration detention. Nor do these detention durations bear any relation to the merits of the subclass members' claims: Of the § 1226(c) subclass members who apply for relief from removal, roughly 40% are granted such relief, a rate even higher than that of the overall class.

In *Rodriguez II*, we held that "the prolonged detention of an alien [under § 1226(c)] without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." 715 F.3d at 1137-38 (quoting *Casas*, 535 F.3d at 951). To avoid these "constitutional concerns, § 1226(c)'s mandatory language must be construed 'to contain an implicit reasonable time limitation.'" *Id.* at 1138 (quoting *Zadvydas*, 533 U.S. at 682). Accordingly, at the six-month mark, "when detention be-

comes prolonged, § 1226(c) becomes inapplicable," and "the Attorney General's detention authority rests with § 1226(a)." *Id.* (citation omitted). Under *Casas*, those detainees are then entitled to a bond hearing. *See id.* (discussing *Casas*, 535 F.3d at 951).

Contrary to the government's argument, this holding is consistent with the text of § 1226(c), which requires that the government detain certain non-citizens but does not mandate such detention for any particular length of time. *See id.* at 1138-39 (The government "does not argue that reading an implicit *temporal limitation* on mandatory detention into the statute is implausible. Indeed, it could not do so, because such an argument is foreclosed by our decisions in *Tijani* and *Casas*.") (alterations in original) (citation omitted). Our holding is also consistent with the Supreme Court's decision in *Demore*, which turned on the brevity of the detention at issue. *See Demore*, 538 U.S. at 513 (holding that Congress may require detention "for the brief period necessary for [a non-citizen's] removal proceedings"); *id.* at 526 (discussing the "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings"); *id.* at 530 n.12 (emphasizing the "very limited time of the detention at stake under § 1226(c)").

Since *Rodriguez II*, no intervening changes in the law have affected our conclusions. Neither the Supreme Court nor our Circuit has had occasion to reexamine these issues, and the Third and Sixth Circuits have not changed the positions they adopted in *Diop* and *Ly*, respectively.

See Chavez-Alvarez v. Warden, York Cnty. Prison, 783 F.3d 469, 478 (3d Cir. 2015) (finding petitioner's detention unreasonable under the *Diop* framework); *cf. Hernandez v. Prindle*, No. 15-10, 2015 WL 1636138, at *7 (E.D. Ky. Apr. 13, 2015) (citing *Ly* for the proposition that a "short" period of detention "to effectuate effective removal," "does not raise due process concerns"), *appeal dismissed* (6th Cir. 2015).

Moreover, district courts have relied on *Rodriguez II* in resolving numerous habeas petitions filed by immigration detainees. *See, e.g., Castaneda v. ICE Field Office Dir.*, No. 14-1427, 2015 WL 71584, at *2-3 (W.D. Wash. Jan. 6, 2015) (addressing whether the petitioner's bond hearing complied with the requirements of *Rodriguez II*); *Garcia-Perez v. Kane*, No. 13-01870, 2014 WL 3339794, at *2 (D. Ariz. July 8, 2014) (noting that, under *Rodriguez II*, "detention always becomes prolonged at six months," but denying a habeas petition because petitioner "has not been detained for longer than six months"); *Lopez v. Napolitano*, No. 12-01750, 2014 WL 1091336, at *4-6 (E.D. Cal. Mar. 18, 2014) (extending *Rodriguez II* to a non-citizen detained under § 1226(a) pending reinstatement of a previously issued removal order); *Franco-Gonzalez v. Holder*, No. 10-02211, 2013 WL 3674492, at *10-13 (C.D. Cal. Apr. 23, 2013) (applying *Rodriguez II* in holding that a class of non-citizens detained under §§ 1225(b), 1226, and 1231 are entitled to bond hearings after six months of detention).

Thus, *Rodriguez II* is law of the case and law of the circuit. As we recently explained, the "law of the case

doctrine" provides that "a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case." *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) (en banc), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247 (2013); *see also Gonzales v. U.S. Dep't of Homeland Sec.*, 712 F.3d 1271, 1278 (9th Cir. 2013); *Bernhardt v. Los Angeles County*, 339 F.3d 920, 924 (9th Cir. 2003). Likewise, pursuant to the "'law of the circuit' rule," "a published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'" *Gonzalez*, 677 F.3d at 389 n.4 (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)); *see also United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) ("[W]here a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit. . . . ").

The "'general rule' is that our decisions 'at the preliminary injunction phase do not constitute the law of the case.'" *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075 n.5 (9th Cir. 2015) (quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007)). Because preliminary injunction decisions are often "made hastily and on less than a full record," they "may provide little guidance as to the appropriate disposition on the merits." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013) (citations omitted); *see also S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th

Cir. 2004). However, "there is an exception to the general rule for 'conclusions on pure issues of law.'" *Stormans*, 794 F.3d at 1075 n.5 (quoting *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804-05 (9th Cir. 2011)); *see also Ranchers Cattlemen*, 499 F.3d at 1114 ("Any of our conclusions on pure issues of law, however, are binding.").

The question resolved in *Rodriguez II*—whether noncitizens subject to prolonged detention under § 1226(c) are entitled to bond hearings—is a pure question of law. We interpreted the statute by applying the canon of constitutional avoidance, and were bound to do so by our prior precedent. The decision was not made "hastily"; it provided a "fully considered appellate ruling" on the legal issues. *Ranchers Cattlemen*, 499 F.3d at 1114 (quoting 18 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2002)). We therefore follow *Rodriguez II* as law of the case and law of the circuit.[9]

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[9] The government's primary arguments regarding § 1226(c) are that we misconstrued *Demore* and other Supreme Court precedent, that the permanent injunction is inconsistent with the language and purpose of § 1226(c), and that bond hearings following six months of incarceration are not necessary and are an inappropriate "one size fits all" remedy. These arguments are foreclosed by *Rodriguez II*. The government also argues that any challenges to detention under § 1226(c) must be addressed through individual as-applied claims. This argument is foreclosed by *Rodriguez I*, which reversed the district court's denial of class certification.

2. The § 1225(b) Subclass

Section 1225(b) applies to "applicants for admission" who are stopped at the border or a port of entry, or who are "present in the United States" but "ha[ve] not been admitted." 8 U.S.C. § 1225(a)(1). The statute provides that asylum seekers "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Id.* § 1225(b)(1)(B)(iii)(IV). As to all other applicants for admission, the statute provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. *Id.* § 1225(b)(2)(A).

Under DHS regulations, non-citizens detained pursuant to § 1225(b) are generally not eligible for release on bond. 8 C.F.R. § 236.1(c)(2). If there are "urgent humanitarian reasons or significant public benefit[s]" at stake,[12] however, the Attorney General has discretion to temporarily parole such an individual into the United States, provided that the individual presents neither a danger nor a risk of flight. 8 U.S.C. § 1182(d)(5)(A). Because parole decisions under § 1182 are purely discretionary, they cannot be appealed to IJs or courts. This lack of review has proven especially problematic when immigration officers have denied parole based on blatant

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[12] Under this standard, detainees are eligible for parole if they have serious medical conditions, are pregnant, are juveniles who meet certain conditions, or will be witnesses in judicial, administrative, or legislative proceedings. *See* 8 C.F.R. § 212.5(b).

errors: In two separate cases identified by the petitioners, for example, officers apparently denied parole because they had confused Ethiopia with Somalia. And in a third case, an officer denied parole because he had mixed up two detainees' files.

As with § 1226(c), the government often cites § 1225(b)'s mandatory language to justify indefinite civil detention without an individualized determination as to whether the detainee would pose a danger or flight risk if released. *See, e.g.*, *Nadarajah*, 443 F.3d at 1071, 1076 (asylum seeker detained for nearly five years). Section 1225(b) subclass members have been detained for as long as 831 days, and for an average of 346 days each. These individuals apply for and receive relief from removal at very high rates: 94% apply, and of those who apply, 64% are granted relief. In illustrative cases identified by the petitioners, non-citizens fled to the United States after surviving kidnapping, torture, and murder of their family members in their home countries. Upon arrival, these individuals were detained under § 1225(b), and they remained in detention until the government granted their asylum applications hundreds of days later.

In *Rodriguez II*, we extended *Casas* and held that to avoid serious constitutional concerns, mandatory detention under § 1225(b), like mandatory detention under § 1226(c), must be construed as implicitly time-limited. *Rodriguez II*, 715 F.3d at 1144. Accordingly, "the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien shifts to § 1226(a), which is discretionary and which

we have already held requires a bond hearing." *Id.* (citing *Casas*, 535 F.3d at 948).

In so holding, we recognized that many members of the § 1225(b) subclass are subject to the "entry fiction" doctrine, under which non-citizens seeking admission to the United States "may physically be allowed within its borders pending a determination of admissibility," but "are legally considered to be detained at the border and hence as never having effected entry into this country." *Id.* at 1140 (quoting *Barrera-Echevarria*, 44 F.3d at 1450). Such non-citizens therefore "enjoy very limited protections under the United States constitution." *Id.* (quoting *Barrera-Echevarria*, 44 F.3d at 1450). However, even if the majority of prolonged detentions under § 1225(b) are constitutionally permissible, "the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance." *Id.* at 1141 (citing *Clark*, 543 U.S. at 380). Section 1225(b) applies to several categories of lawful permanent residents who are not subject to the entry fiction doctrine but may be treated as seeking admission under 8 U.S.C. § 1101(a)(13)(C). *See id.* at 1141-42.[11]

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[11] Section 1101(a)(13)(C) provides that:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

Because those persons are entitled to due process protections under the Fifth Amendment, prolonged detention without bond hearings would raise serious constitutional concerns. *See id.* at 1142-43; *see also Zadvydas*, 533 U.S. at 682 (holding that indefinite detention of a once-admitted noncitizen "would raise serious constitutional concerns"). We therefore construed the statutory scheme to require a bond hearing after six months of detention under § 1225(b). *Rodriguez II*, 715 F.3d at 1144.

The government now argues that "[d]espite years of discovery, petitioners have not identified any member of the Section 1225(b) subclass who is a [lawful permanent

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(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

resident]." Petitioners represent that they have found lawful permanent residents who have been detained for more than six months under § 1225(b), although their submissions do not identify any specific individuals who fit that description. The question, however, is whether "one possible application of [the] statute raises constitutional concerns." *Rodriguez II*, 715 F.3d at 1141. Because the government concedes that detention of lawful permanent residents under § 1225(b) is possible under § 1101(a)(13)(C), "the statute as a whole should be construed through the prism of constitutional avoidance." *Rodriguez II*, 715 F.3d at 1141; *see also Clark*, 543 U.S. at 380 ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

The government also argues that lawful permanent residents treated as seeking admission are entitled to lesser due process protections than other lawful permanent residents. But the government has not provided any authority to support that proposition: The cases cited in the government's brief address *statutory and regulatory* distinctions between lawful permanent residents treated as applicants for admission and other lawful permanent residents; they do not reflect any *constitutional* distinction between those groups. *See Gonzaga-Ortega v. Holder*, 736 F.3d 795, 8014 (9th Cir. 2013) (holding that lawful permanent residents treated as applicants for admission are not entitled to counsel under 8 C.F.R.

§ 292.5(b)); *Toro-Romero v. Ashcroft*, 382 F.3d 930, 936 (9th Cir. 2004) (explaining that different statutes govern exclusion of inadmissible non-citizens and removal of deportable noncitizens); *Raya-Ledesma v. INS*, 55 F.3d 418, 420 (9th Cir. 1994) (holding that "the INS limitation of § 212 relief [from deportation] to legal permanent residents who have held that status for more than seven years" does not violate an ineligible non-citizen's equal protection rights).

Finally, the government argues that, instead of requiring bond hearings, we could avoid constitutional concerns by interpreting § 1225(b) not to apply to lawful permanent residents. This argument relies on an implausible construction of the statutes at issue. Section 1225(b) applies to "applicants for admission," and § 1101 defines six categories of lawful permanent residents as "seeking an admission into the United States for purposes of the immigration laws." 8 U.S.C. § 1101(a)(13)(C); *see also Gonzaga-Ortega*, 736 F.3d at 801 ("Ordinarily a returning [lawful permanent resident] is not treated as an 'applicant for admission.' But the statute that so provides includes six exceptions. . . . ").

The Supreme Court's decision in *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), is not to the contrary. *Chew* involved a pre-IIRIRA immigration regulation that applied to "excludable" non-citizens. *Id.* at 591 n.1. Because the regulations were silent as to whether that category included lawful permanent residents returning from voyages abroad, the Court distinguished between the "exclusion" of newly arriving non-citizens and the "ex-

pulsion" of lawful permanent residents, thereby holding that the regulation did not authorize the Attorney General to detain arriving lawful permanent residents without hearings. *Id.* at 598-99. Section 1101(a)(13)(C) forecloses an analogous construction of § 1225(b) because it provides that "applicants for admission" includes several groups of lawful permanent residents. *See* 8 U.S.C. § 1101(a)(13)(C). In any event, the government's alternative construction of § 1225(b) was never raised before the district court; the argument is therefore forfeited. *See Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015); *Saldana v. Occidental Petrol. Corp.*, 774 F.3d 544, 554 (9th Cir. 2014).

Accordingly, we adhere to *Rodriguez II*'s holding regarding the § 1225(b) subclass as law of the case and law of the circuit. *See Gonzalez*, 677 F.3d at 390 n.4. The government's attempts to re-litigate *Rodriguez II* are unavailing.[12]

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[12] The government argues, among other things, that the permanent injunction entered by the district court is inconsistent with § 1225(b), DHS regulations, the political branches' plenary control of the borders, the limited constitutional protections afforded to non-citizens seeking admission to the United States, and Supreme Court precedent. The government also argues that bond hearings are unnecessary because noncitizens detained under § 1225(b) can be released on parole. We considered and rejected these arguments in *Rodriguez II*, and we decline to address them here.

The government also argues that we should reconsider the holding in *Rodriguez II* in light of new evidence, including as to the rates at which non-citizens abscond or commit crimes after release, and the efficacy of the parole process. Because *Rodriguez II* in-

3. The § 1226(a) Subclass

Section 1226(a) authorizes detention "pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). The statute expressly authorizes release on "bond of at least $1,500" or "conditional parole."[13] *Id.* § 1226(a)(2). Following an initial custody determination by DHS, a non-citizen may apply for a review or redetermination by an IJ, and that decision may be appealed to the BIA. *See* 8 C.F.R. §§ 236.1, 1003.19. At these hearings, the detainee bears the burden of establishing "that he or she does not present a danger to persons or property, is not a threat to the national security, and does not pose a risk of flight." *Guerra*, 24 I. & N. Dec. at 38. "After an initial bond redetermination," a request for another review "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." 8 C.F.R. § 1003.19(e). The government has taken the position that additional time spent in

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volved pure questions of law, this new evidence is not material and does not alter our conclusions.

[13] "'[C]onditional parole' under §1226(a)(2)(B) is a 'distinct and different procedure' from 'parole' under § 1182(d)(5)(A))." *Garcia v. Holder*, 659 F.3d 1261, 1268 (9th Cir. 2011) (quoting *In re Castillo-Padilla*, 25 I. & N. Dec. 257, 258 (BIA 2010)). As discussed above, § 1182(d)(5)(A) authorizes the Attorney General to temporarily release non-citizens detained under § 1225(b) "for urgent humanitarian reasons or significant public benefit." Conditional parole under § 1226(a), by contrast, provides for release from detention if the non-citizen "would not pose a danger to property or persons" and "is likely to appear for any further proceeding." 8 C.F.R. § 236.1(c)(8).

detention is not a "changed circumstance" that entitles a detainee to a new bond hearing.

Although § 1226(a) provides for discretionary, rather than mandatory, detention and establishes a mechanism for detainees to seek release on bond, non-citizens often face prolonged detention under that section. *See, e.g.*, *Casas*, 535 F.3d at 944 (lawful permanent resident detained for seven years); *Singh*, 638 F.3d at 1203 (lawful permanent resident detained for nearly four years). In an extreme case identified by the petitioners, a non-citizen with no criminal record entered the United States on a tourist visa and affirmatively applied for asylum, withholding of removal, and relief under the Convention Against Torture shortly after that visa expired. ICE detained him throughout the ensuing proceedings before the IJ, the BIA, and the Ninth Circuit. At the time petitioners generated their report, he had been detained for 1,234 days with no definite end in sight.

The district court's decision regarding the § 1226(a) subclass was squarely controlled by our precedents. In *Casas*, we held that a non-citizen subjected to prolonged detention under § 1226(a) is entitled to a hearing to establish whether continued detention is necessary because he would pose a danger to the community or a flight risk upon release. 535 F.3d at 949-52. Since deciding *Casas*, we have repeatedly affirmed its holding. *See Cole v. Holder*, 659 F.3d 762, 769 n.7 (9th Cir. 2011); *Singh*, 638 F.3d at 1200; *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 n.3 (9th Cir. 2010); *Makaj v. Crowther*, 294 F. App'x 328,

329-30 (9th Cir. 2008) (non-precedential memorandum disposition).

The government does not contest that *Casas* is the binding law of this circuit or that individuals detained under § 1226(a) are entitled to bond hearings. Instead, the government argues that § 1226(a) affords detainees the right to request bond hearings, *see* 8 C.F.R. § 236.1, so there is no basis for requiring the government to automatically provide bond hearings after six months of detention. This argument is foreclosed by *Casas*, which held that "§ 1226(c) must be construed as *requiring* the Attorney General to provide the alien with [a bond] hearing." 535 F.3d at 951; *see also Rodriguez II*, 715 F.3d at 1135 (citing *Casas* for the proposition that under § 1226(a), "a bond hearing is required before the government may detain an alien for a 'prolonged' period"). The record evinces the importance of *Casas*'s holding on this point: Detainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate. As a result, many class members are not aware of their right to a bond hearing and are poorly equipped to request one. Accordingly, we conclude that class members are entitled to automatic bond hearings after six months of detention. We address the other procedural requirements for these hearings in Section IV.B, *infra*.

4. The § 1231(a) Subclass

Section 1231(a) governs detention of non-citizens who have been "ordered removed." 8 U.S.C. § 1231(a). The

statute provides for mandatory detention during a ninety-day removal period. *Id.* § 1231(a)(2). Under the statute:

> The removal period begins on the latest of the following:
>
> (i) The date the order of removal becomes administratively final.
>
> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

Id. § 1231(a)(1)(B). The removal period may be extended beyond ninety days if a detainee "fails or refuses" to cooperate in his removal from the United States. *Id.* § 1231(a)(1)(C).

"If the alien does not leave or is not removed within the removal period," he "shall be subject to supervision," but detention is no longer mandatory. *Id.* § 1231(a)(3). Rather, the Attorney General has discretion to detain certain classes of non-citizens and to impose conditions of release on others. *Id.* § 1231(a)(3), (a)(6).[14] Before releasing a detainee, the government must conclude that

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[14] To avoid "serious constitutional concerns," we have previously "construe[d] § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision." *Diouf II*, 634 F.3d at 1086 (quoting *Casas*, 535 F.3d at 950).

removal is "not practicable or not in the public interest," that the detainee is "non-violent" and "not likely to pose a threat to the community following release," and that the detainee "does not pose a significant flight risk" and is "not likely to violate the conditions of release." 8 C.F.R. § 241.4(e); *see also id.* § 241.4(f) (enumerating factors the review panel should "weigh[] in considering whether to recommend further detention or release of a detainee").

Here, the class is defined, in relevant part, as non-citizens who are detained "pending completion of removal proceedings, including judicial review." The class therefore by definition excludes any detainee subject to a final order of removal.

Petitioners describe the § 1231(a) subclass as individuals detained under that section who have received a stay of removal from the BIA or a court. However, if a non-citizen has received a stay of removal from the BIA pending further administrative review, then the order of removal is not yet "administratively final." 8 U.S.C. § 1231(a)(1)(B)(i). The non-citizen has not been "ordered removed," and the removal period has not begun, so § 1231(a) is inapplicable. *See Owino v. Napolitano*, 575 F.3d 952, 955 (9th Cir. 2009) ("[W]hile administrative proceedings are pending on remand, Owino will not be subject to a *final* order of removal, so § 1231 cannot apply."). Similarly, as long as a non-citizen's removal order is stayed by a court pending judicial review, that non-citizen is not subject to "the court's final order." 8 U.S.C. § 1231(a)(1)(B)(ii). In such circumstances, § 1231(a) is, again, inapplicable. *See Prieto-Romero v. Clark*, 534

F.3d 1053, 1059 (9th Cir. 2008) ("[Section] 1231(a) does not provide authority to detain an alien . . . whose removal has been stayed by a court of appeals pending its disposition of his petition for review."); *Casas*, 535 F.3d at 947 ("If an alien has filed a petition for review with this court and received a judicial stay of removal, the 'removal period' under § 1231(a) does not begin until this court 'denies the petition and withdraws the stay of removal.'") (quoting *Prieto-Romero*, 534 F.3d at 1060).[15]

Simply put, the § 1231(a) subclass does not exist. The district court's grant of summary judgment and permanent injunction are therefore reversed to the extent they pertain to individuals detained under § 1231(a).

C. Procedural Requirements

In addition to challenging the class members' entitlement to automatic bond hearings after six months of detention, the government objects to the district court's order regarding the burden and standard of proof at such hearings. The government also appeals the district court's ruling that IJs must consider alternatives to detention. Petitioners cross-appeal the district court's rulings that IJs are not required to consider the ultimate likelihood of removal, assess the total length of detention,

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[15] "Such aliens may be detained, however, pursuant to § 1226(a), which allows the Attorney General to detain any alien 'pending a decision on whether the alien is to be removed from the United States.'" *Prieto-Romero*, 534 F.3d at 1059. As noted, noncitizens subjected to prolonged detention under § 1226(a) are entitled to bond hearings. *See Casas*, 535 F.3d at 944, 949-51.

or conduct periodic hearings at six-month intervals. We address each issue in turn.

1. Burden and Standard of Proof

The government argues that the district court erred in requiring the government to justify a non-citizen's detention by clear and convincing evidence, an intermediate burden of proof that is more than a preponderance of the evidence but less than proof beyond a reasonable doubt. As we noted in *Rodriguez II*, however, we are bound by our precedent in *Singh*, which held that "the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a *Casas* hearing." *Rodriguez II*, 715 F.3d at 1135 (quoting *Singh*, 638 F.3d at 1203).

In *Singh*, we explained that the "Supreme Court has repeatedly reaffirmed the principle that 'due process places a heightened burden of proof on the State in civil proceedings in which the individual interests at stake . . . are both particularly important and more substantial than mere loss of money.'" 638 F.3d at 1204 (alteration in original) (quoting *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (criminal defendant's competence to stand trial)) (citing *Foucha*, 504 U.S. at 80 (indefinite confinement of a criminal defendant acquitted by reason of insanity); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportation of a lawful permanent resident); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (revocation of naturalized citizenship)). In the civil commitment context, for example, the Supreme Court has recognized "the state's interest in committing the emotionally disturbed," but has held that

"the individual's interest in not being involuntarily confined indefinitely . . . is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 425-27 (1979). Drawing on this jurisprudence, *Singh* concluded that "a clear and convincing evidence standard of proof provides the appropriate level of procedural protection" in light of "the substantial liberty interest at stake." 638 F.3d at 1203-04 (citing *Addington*, 441 U.S. at 427).

The government now contends that *Singh* was wrongly decided. However, it is well established that only a full court, sitting en banc, may overrule a three-judge panel decision. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Right or wrong, we are bound to follow *Singh* unless intervening Supreme Court authority is to the contrary. *Id.*

2. Restrictions Short of Detention

The government also argues that the district court erred in "determin[ing] that IJs are required to consider the use of alternatives to detention in making bond determinations." As the district court's order states, however, IJs "should already be considering restrictions short of incarceration." Indeed, *Rodriguez II* affirmed a preliminary injunction that directed IJs to "release each Subclass member *on reasonable conditions of supervision, including electronic monitoring if necessary*, unless the government" satisfied its burden of justifying continued detention. 715 F.3d at 1131 (emphasis added).

The government's objections to this requirement are unpersuasive. First, the government relies on *Demore* for the proposition that the government is not required "to employ the least burdensome means" of securing immigration detainees. *Demore*, 538 U.S. at 528. But *Demore* applies only to "brief period[s]" of immigration detention. *Id.* at 513, 523. "When the period of detention becomes prolonged, 'the private interest that will be affected by the official action' is more substantial; greater procedural safeguards are therefore required." *Diouf II*, 634 F.3d at 1091 (quoting *Mathews*, 424 U.S. at 335). Further, the injunction does not require that IJs apply the least restrictive means of supervision; it merely directs them to "consider" restrictions short of detention. The IJ ultimately must decide whether any restrictions short of detention would further the government's interest in continued detention.

Second, the government argues that IJs are not empowered to impose conditions of release. However, federal regulations authorize IJs to "detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released" and to "ameliorat[e] the conditions" of release imposed by DHS. 8 C.F.R. § 1236.1(d)(1). Accordingly, if DHS detains a noncitizen, an IJ is already empowered to "ameliorat[e] the conditions" by imposing a less restrictive means of supervision than detention.[16]

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[16] The authorities the government cites provide no support for this argument. One discusses DHS officers' authority to impose conditions of release and allows IJs to "ameliorat[e] those condi-

Finally, the government argues that IJs lack the resources to engage in continuous monitoring of released individuals. However, the government fails to cite any law or evidence indicating that IJs, rather than DHS or ICE agents, would be responsible for implementing the conditions of release. Moreover, the record indicates that Congress authorized and funded an ICE alternatives-to-detention program in 2002, and DHS has operated such a program, called the Intensive Supervision and Appearance Program, since 2004. It is abundantly clear that IJs can and do[17] consider conditions of release on bond when determining whether the government's interests can be served by detention only, and we conclude that DHS will administer any such conditions, regardless of whether they are imposed by DHS in the first instance or by an IJ upon later review.

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tions," *see* 8 C.F.R. § 236.1; the other provides only that IJs may not grant relief from removal for the purpose of fulfilling the United States' treaty obligations, *see In re G-K-*, 26 I. & N. Dec. 88, 93 (BIA 2013).

[17] On September 10, 2015, the government provided us with the only transcript of a *Rodriguez* hearing in this record, which took place on April 28, 2015, and concerned a Mr. Kaene Dean. There, the IJ did consider and impose conditions of release in addition to bond, including monthly reporting to DHS and enrollment in a mental health treatment plan. From the transcript, it does not appear that the government presented any evidence that these conditions would be insufficient to prevent the risk of danger to the community, or even any evidence at all. However, the IJ's decision to release on bond a recidivist sexual offender whom the DOJ had released twice before in proceedings unrelated to this case under § 1226(a) and who had twice before violated the conditions of his release on bond is not before us. *See* October 2, 2015 Order.

3. Length of Detention and Likelihood of Removal

In their cross-appeal, petitioners argue that the district court erred in failing to require IJs to consider the length of a non-citizen's past and likely future detention and, relatedly, the likelihood of eventual removal from the United States. In our prior decisions, we have not directly addressed whether due process requires consideration of the length of future detention at bond hearings. We have noted, however, that "the due process analysis changes as 'the period of . . . confinement grows,'" and that longer detention requires more robust procedural protections. *Diouf II*, 634 F.3d at 1086 (quoting *Zadvydas*, 634 F.3d 1081). Accordingly, a noncitizen detained for one or more years is entitled to greater solicitude than a non-citizen detained for six months. Moreover, Supreme Court precedent provides that "detention incidental to removal must bear a reasonable relation to its purpose." *Tijani*, 430 F.3d at 1249 (Tashima, J., concurring) (citing *Demore*, 538 U.S. at 527; *Zadvydas*, 533 U.S. at 690). At some point, the length of detention could "become[] so egregious that it can no longer be said to be 'reasonably related' to an alien's removal." *Id.* (citation omitted). An IJ therefore must consider the length of time for which a noncitizen has already been detained.

As to the likely duration of future detention and the likelihood of eventual removal, however, those factors are too speculative and too dependent upon the merits of the detainee's claims for us to require IJs to consider during a bond hearing. We therefore affirm the district court's ruling that consideration of those factors "would require

legal and political analyses beyond what would otherwise be considered at a bond hearing" and is therefore not appropriate. We note that *Zadvydas* and its progeny require consideration of the likelihood of removal in particular circumstances,[18] but we decline to require such analysis as a threshold inquiry in all bond hearings.

4. Periodic Hearings

The record shows that many class members are detained well beyond the six-month mark: Almost half remain in detention at the twelve-month mark, one in five at eighteen months, and one in ten at twenty-four months. Petitioners argue that due process requires additional bond hearings at six-month intervals for class members who are detained for more than six months after their initial bond hearings. We have not had occasion to address this issue in our previous decisions, and it has been a source of some contention in the district courts. *See, e.g.*, *Vivorakit v. Holder*, No. 14-04515, 2015 WL 4593545, at *4 (N.D. Cal. July 30, 2015); *Castaneda v. Aitken*, No. 15-01635, 2015 WL 3882755, at *10 (N.D. Cal. June 23, 2015).

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[18] Several of our cases have addressed petitions for habeas relief under *Zadvydas*, which requires a detainee to prove that he "is not significantly likely to be removed." *Owino*, 575 F.3d at 955; *see also Diouf v. Mukasey* (*Diouf I*), 542 F.3d 1222, 1233 (9th Cir. 2008); *Prieto-Romero*, 534 F.3d at 1065; *Nadarajah*, 443 F.3d at 1080. Those decisions instruct IJs to consider the likelihood of removal when, for instance, a detainee is stateless. *See Owino*, 575 F.3d at 955-56. However, petitioners have not identified, and we have not found, authority that supports requiring this inquiry in all bond hearings.

The district court here did not address this proposed requirement. For the same reasons the IJ must consider the length of past detention, we hold that the government must provide periodic bond hearings every six months so that noncitizens may challenge their continued detention as "the period of . . . confinement grows." *Diouf II*, 634 F.3d at 1091 (quoting *Zadvydas*, 533 U.S. at 701).

V. Conclusion

This decision flows from the Supreme Court's and our own precedent bearing on the constitutional implications of our government's prolonged civil detention of individuals, many of whom have the legal right to live and work in our country. By upholding the district court's order that Immigration Judges must hold bond hearings for certain detained individuals, we are not ordering Immigration Judges to release any single individual; rather we are affirming a minimal procedural safeguard—a hearing at which the government bears only an intermediate burden of proof in demonstrating danger to the community or risk of flight—to ensure that after a lengthy period of detention, the government continues to have a legitimate interest in the further deprivation of an individual's liberty. Immigration Judges, a specialized and experienced group within the Department of Justice, are already entrusted to make these determinations, and need not release any individual they find presents a danger to the community or a flight risk after hearing and weighing the evidence. Accordingly, we affirm all aspects of the district court's permanent injunction, with three exceptions: We reverse as to the § 1231(a) subclass, and we hold that IJs must consider the length of

detention and provide bond hearings every six months. We hereby remand to the district court to enter a revised injunction consistent with our instructions.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-56734

ALEJANDRO RODRIGUEZ; ABDIRIZAK ADEN FARAH; JOSE FARIAS CORNEJO; YUSSUF ABDIKADIR; ABEL PEREZ RUELAS, FOR THEMSELVES AND ON BEHALF OF A CLASS OF SIMILARLY-SITUATED INDIVIDUALS, PETITIONERS-APPELLEES

AND

EFREN OROZCO, PETITIONER

v.

TIMOTHY ROBBINS, FIELD OFFICE DIRECTOR, LOS ANGELES DISTRICT, IMMIGRATION AND CUSTOMS ENFORCEMENT; JANET NAPOLITANO, SECRETARY HOMELAND SECURITY; ERIC H. HOLDER, JR., ATTORNEY GENERAL; WESLEY LEE, ASSISTANT FIELD OFFICE DIRECTOR, IMMIGRATION AND CUSTOMS ENFORCEMENT; RODNEY PENNER, CAPTAIN, MIRA LOMA DETENTION CENTER; SANDRA HUTCHENS, SHERIFF OF ORANGE COUNTY; OFFICER NGUYEN, OFFICER-IN-CHARGE, THEO LACY FACILITY; CAPTAIN DAVIS NIGHSWONGER, COMMANDER, THEO LACY FACILITY; CAPTAIN MIKE KREUGER, OPERATIONS MANAGER, JAMES A. MUSICK FACILITY; ARTHUR EDWARDS, OFFICER-IN-CHARGE, SANTA ANA CITY JAIL; RUSSELL DAVIS, JAIL ADMINISTRATOR, SANTA ANA CITY JAIL; JUAN P. OSUNA, DIRECTOR, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, RESPONDENTS-APPELLANTS

Argued and Submitted: Mar. 4, 2013
Filed: Apr. 16, 2013

OPINION

Before: KIM MCLANE WARDLAW AND RONALD M. GOULD, Circuit Judges AND SAM E. HADDON, District Judge*

WARDLAW, Circuit Judge:

Alejandro Rodriguez, Abdirizak Aden Farah, Jose Farias Cornejo, Yussuf Abdikadir, and Abel Perez Ruelas ("Appellees") are the named plaintiffs representing a certified class of non-citizens who challenge their prolonged detention, pursuant to certain federal immigration statutes, without individualized bond hearings and determinations to justify their continued detention.[1] The district court entered a preliminary injunction requiring the government to identify all

* The Honorable Sam E. Haddon, District Judge for the U.S. District Court for the District of Montana, sitting by designation.

[1] The class consists of: all non-citizens within the Central District of California who:

> (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a hearing to determine whether their detention is justified.

class members detained pursuant to 8 U.S.C. §§ 1226(c) and 1225(b) (the "1226(c) subclass" and "1225(b) subclass," respectively), and to "provide each of them with a bond hearing before an Immigration Judge with power to grant their release." Under the preliminary injunction, at the conclusion of each bond hearing, the Immigration Judge ("IJ") "shall release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight."[2] The government appeals that order, and we affirm.

I.

At any given time, thousands of immigrants to the United States are detained while they await the conclusion of administrative and judicial proceedings that will determine whether they may remain in this country. According to the most recently available statistics, over 429,000 detainees were held by U.S. Immigration and Customs Enforcement ("ICE") over the

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[2] The district court entered its order on September 13, 2012. Thereafter, a panel of our court stayed the injunction for 30 days, giving the government until November 12, 2012 to comply with the preliminary injunction. At oral argument, government counsel represented that, since bond hearings began in mid-November of 2012, about 400 hearings have been conducted under the district court's order. Government counsel stated that about two-thirds of those hearings resulted in the release of the alien on bond.

course of fiscal year 2011; on average, over 33,000 were detained on any given day.[3] As of late 2011, the Los Angeles Field Office of ICE oversaw the detention of over 2,000 aliens, the great majority of whom were not subject to a final order of removal. *Id.* at 1.

This appeal concerns individuals detained in southern California for six months or longer under one of two federal immigration statutes. Section 1226(c) of Title 8 of the United States Code ("Section 1226(c)" or "§ 1226(c)") subjects certain aliens who are deportable or inadmissible on account of their criminal history to mandatory detention pending proceedings to remove them from the United States.[4] If an ICE official

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[3] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations Facts and Statistics 3 (2011), *available at* http://www.ice.gov/doclib/foia/reports/erofacts-and-statistics.pdf.

[4] Mandatory detention under Section 1226(c) applies to aliens who are inadmissible on account of having committed a crime involving moral turpitude or a controlled substance offense, on account of having multiple criminal convictions with an aggregate sentence of five years or more of confinement, on account of connections to drug trafficking, prostitution, money laundering, or human trafficking, on account of having carried out severe violations of religious freedom while serving as a foreign government official, or on account of having been involved in serious criminal activity and asserting immunity from prosecution; aliens who are deportable on account of having been convicted of two or more crimes involving moral turpitude, an aggravated felony, a controlled substance offense, certain firearm-related offenses, or certain other miscellaneous crimes; aliens who are deportable on account of having committed a crime of moral turpitude within a certain amount of time since their date of admission for which a

determines that an individual's criminal history triggers application of § 1226(c), the alien is processed for detention. If the relevant ICE official is unsure whether § 1226(c) applies to a certain individual, he may consult an ICE attorney who is "embedded" in the field office. Detainees are permitted to ask an Immigration Judge to reconsider the applicability of mandatory detention, *see* 8 C.F.R. § 1003.19(h)(2)(ii), but such review is limited in scope and addresses only whether the individual's criminal history falls within the statute's purview. *See generally In re Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999).

Section 1225(b) of Title 8 ("Section 1225(b)" or "§ 1225(b)"), the other statute at issue here, applies to "applicants for admission," such as those apprehended at the border or at a port of entry. The statute provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained" for removal proceedings. 8 U.S.C. § 1225(b)(2)(A); *see also* 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (providing for mandatory detention of asylum seekers "pending a final determination of credible fear of persecution and, if found not to

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sentence of one year or longer has been imposed; and aliens who are inadmissible or deportable because of connections to terrorism. *See* 8 U.S.C. § 1226(c) (cross-referencing 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)(A)(ii), 1227(a)(2)(A)(iii), 1227(a)(2)(B), 1227(a)(2)(C), 1227(a)(2)(D), 1227(a)(2)(A)(i), 1182(a)(3)(B), 1227(a)(4)(B)).

have such a fear, until removed."). Although Section 1225(b) generally mandates the detention of aliens seeking admission pending their removal proceedings, individuals detained under the statute may be eligible for discretionary parole from ICE custody. *See* 8 U.S.C. § 1182(d)(5)(A).[5] In the Central District of California, detainees are notified that they will be reviewed for parole and are asked to fill out a questionnaire and to submit to an interview with ICE officers to probe their suitability for parole. The agency considers the alien's potential dangerousness and criminal history, as well as flight risk, in making parole determinations. If a detainee is denied parole, he or she is notified orally and by a written form on which the explanation for the denial is conveyed through a checked box. Before the district court entered the preliminary injunction, parole was the only possible

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[5] Section 1182(d)(5)(A) provides:

> The Attorney General may, except as provided in subparagraph (B) or in section 1184(f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

release mechanism available to most 1225(b) subclass members.

Appellees argue that prolonged mandatory detention under these statutes without any possibility for review of the government's justification for their imprisonment by a neutral arbiter would raise grave constitutional concerns. Thus, relying on a related series of our decisions, Appellees requested a preliminary injunction guaranteeing them, when their detention exceeds six months in duration, an individualized determination of whether their continued detention is necessitated by any flight risk or possible danger to the community. The government argues that both statutes unambiguously require mandatory detention with no limit on the duration of imprisonment and that the Supreme Court has repeatedly affirmed the federal government's constitutional and statutory authority to require such detention. We agree with the district court that, based on our precedent, the canon of constitutional avoidance requires us to construe the government's statutory mandatory detention authority under Section 1226(c) and Section 1225(b) as limited to a six-month period, subject to a finding of flight risk or dangerousness.

II.

"The district court's grant of a preliminary injunction is reviewed for abuse of discretion and should be reversed if the district court based its decision on an erroneous legal standard or on clearly erroneous find-

ings of fact." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (internal quotation marks omitted). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review." *Id.* An overbroad injunction is an abuse of discretion. *Id.*

III.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). To determine whether the district court abused its discretion in entering the preliminary injunction, then, we consider in turn: (1) Appellees' likelihood of success on the merits; (2) whether they have established a likelihood of irreparable harm; (3) the balance of equities; and (4) where the public interest lies.[6]

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[6] The government suggests that Federal Rule of Civil Procedure 52(a) requires us to reverse and remand because the district court failed to make explicit findings of fact and conclusions of law in its order. Rule 52(a) directs that "the court must find the facts specially and state its conclusions of law separately." While in general "[a] district court must set forth findings of fact and conclusions of law supporting an order granting an injunction," we have held that "failure to comply with Rule 52(a) does not require reversal unless a full understanding of the question is not possible without the aid of separate findings." *FTC v. Enforma Natural*

A. Likelihood of Success on the Merits

Appellees claim that the federal immigration detention statutes must be construed to require "rigorous bond hearings" for members of the 1226(c) and 1225(b) subclasses. They urge that, because prolonged mandatory detention without a bond hearing would raise grave constitutional concerns, we must read the statutes in a way that permits the possibility of release on review by a neutral decision- maker. It is "a cardinal principle" of statutory interpretation that, "if a serious doubt of constitutionality is raised" by one possible construction of a statute, we must "ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932). "The canon favoring constructions of statutes to avoid constitutional questions does not, however, license a court to usurp the policy-making and legislative functions of

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Prods., Inc., 362 F.3d 1204, 1212 (9th Cir. 2004). In general, we will remand only "where a district court's findings and conclusions supporting the preliminary injunction are not sufficient to permit meaningful review." *Id.* Here, by virtue of Appellees' membership in the subclasses at issue, the relevant facts are inherently undisputed: Each Appellee has been held for at least six months under one of the pertinent immigration detention statutes without an opportunity to contest his detention in a bond hearing. As the government concedes, "[t]his case presents, at its core, a question of statutory and constitutional interpretation that does not turn on the facts of any individual Petitioner." The government offers no reason why meaningful review is not possible on the current record.

duly-elected representatives." *Heckler v. Mathews*, 465 U.S. 728, 741, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984). Our task is therefore to determine whether the government's reading of Sections 1226(c) and 1225(b) raises constitutional concerns and, if so, whether an alternative construction is plausible without overriding the legislative intent of Congress.

We begin with the premise that "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). Thus, the Supreme Court has held that the indefinite detention of a once- admitted alien "would raise serious constitutional concerns." *Id.* at 682, 121 S. Ct. 2491. However, the Supreme Court has also expressed a "longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings." *Demore v. Kim*, 538 U.S. 510, 526, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003). We therefore must determine whether the government's authority to mandatorily detain aliens under Sections 1226(c) and 1225(b) for prolonged periods raises the constitutional concerns identified by the Supreme Court in *Zadvydas*, or whether such detention is consistent with *Demore* and, thereby, permissible.

These are not entirely new questions for our court. As noted by the previous panel that reversed the district court's denial of class certification, in a series of

decisions since 2001, "the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing." *Rodriguez v. Hayes* (*Rodriguez I*), 591 F.3d 1105, 1114 (9th Cir. 2010). After *Zadvydas* and *Demore*, we held in *Tijani v. Willis*, 430 F.3d 1241 (9th Cir. 2005), that the detention under § 1226(c) of a lawfully admitted resident alien subject to removal for over 32 months was "constitutionally doubtful." *Id.* at 1242 ("Despite the substantial powers that Congress may exercise in regard to aliens, it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted resident aliens who are subject to removal."). "To avoid deciding the constitutional issue, we interpret[ed] the authority conferred by § 1226(c) as applying to expedited removal of criminal aliens" and held that "[t]wo years and eight months of process is not expeditious." *Id.* Thus, we remanded Tijani's petition to the district court with directions to grant a writ of habeas corpus unless the government provided a bail hearing within 60 days. *Id.*

We expanded on this reasoning in *Casas-Castrillon v. Department of Homeland Security* (*Casas*), 535 F.3d 942 (9th Cir. 2008). In *Casas*, a lawful permanent resident ("LPR") who had been detained for seven years sought habeas relief while his petition for review of his removal order was pending before this court. *Id.* at

944-45. We interpreted *Demore* to hold "that § 1226(c) was intended only to 'govern[ ] detention of deportable criminal aliens pending their removal proceedings,' which the Court emphasized typically 'lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal' his removal order to the BIA." *Id.* at 948 (alteration in original) (quoting *Demore*, 538 U.S. at 527-28, 530, 123 S. Ct. 1708) (emphasis omitted). Concluding that § 1226(c) applies during only administrative removal proceedings (i.e., up until the BIA dismisses an alien's appeal but not during the pendency of judicial review), we held "that Casas' detention was authorized during this period [while he awaited judicial review] under the Attorney General's general, discretionary detention authority under § 1226(a)."[7] *Id.* In other words, § 1226(c)'s manda-

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[7] Section 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this Section and pending such decision, the Attorney General—
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> (1) may continue to detain the arrested alien; and
>
> (2) may release the alien on—
>
> (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or
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> (B) conditional parole; but

tory detention provisions apply only until the BIA affirms a removal order, at which point the government's authority to detain the alien shifts to § 1226(a), where it remains until "we have rejected his final petition for review or his time to seek such review expires." *Id.*

Having concluded that Casas' continued detention was "authorized" under § 1226(a), we observed that "[t]here is a difference between detention being authorized and being necessary as to any particular person," and thus held "that the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." *Id.* at 949. We further noted that while "[t]he Supreme Court upheld § 1226(c)'s mandatory detention provision in *Demore*, [it] did so with the specific understanding that § 1226(c) authorized mandatory detention only for the 'limited period of [the alien's] removal proceedings,'" which the Court emphasized was brief. *Id.* at 950 (alteration in original) (quoting *Demore*, 538 U.S. at 530, 123 S. Ct. 1708). Because *Demore*'s holding hinged on the brevity of mandatory detention, we concluded in Casas that "pro-

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(3) may not provide the alien with work authorization

(including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

longed detention of aliens is permissible only where the Attorney General finds such detention individually necessary by providing the alien with an adequate opportunity to contest the necessity of his detention." *Id.* at 951. We thus held that, under § 1226(a)'s discretionary detention regime, a bond hearing is required before the government may detain an alien for a "prolonged" period. *Id.*

Two questions left unanswered by our opinion in *Casas*—the procedural requirements for bond hearings under *Casas* and the precise definition of "prolonged" detention—have been answered in more recent opinions. First, in *Singh v. Holder*, 638 F.3d 1196 (9th Cir. 2011), we provided guidance to immigration officials as to the procedures required at a *Casas* hearing. With regard to the appropriate burden of proof, we held that, "[g]iven the substantial liberty interest at stake . . . the government must prove by clear and convincing evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a Casas hearing." *Singh*, 638 F.3d at 1203. We further held that, in considering whether the government has proven dangerousness, IJs should consider the factors identified in *In re Guerra*, 24 I. & N. Dec. 37 (B.I.A.2006), which include the extensiveness of an alien's criminal record, the recency of his criminal activity, and the seriousness of his offenses. *Singh*, 638 F.3d at 1206 (citing *Guerra*, 24 I. & N. Dec. at 40). We also held that "due process requires a contemporaneous record of Casas hearings," such as a

transcript or an audio recording available upon request. *Id.* at 1208.

Second, in *Diouf v. Napolitano* (*Diouf II*), 634 F.3d 1081 (9th Cir. 2011), we addressed the definition of "prolonged" detention for purposes of the Casas bond hearing requirement. *Diouf II* first extended the holding of Casas to aliens discretionarily detained under 8 U.S.C. § 1231(a)(6).[8] *Id.* at 1086. Rejecting the government's proferred bases for distinguishing Casas, *see id.*, we held that "an alien facing prolonged detention under § 1231(a)(6) is entitled to a bond hearing before an immigration judge and is entitled to be released from detention unless the government establishes that the alien poses a risk of flight or a danger to the community." *Id.* at 1092. Importantly, we indicated that an "alien's continuing detention becomes prolonged" at the 180- day mark. *Id.* at 1091.

> When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound. Furthermore, the risk of an erroneous deprivation of liberty in the

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[8] Section 1231(a)(6) permits the continued detention, beyond the 90-day statutory removal period that begins when a removal order becomes final, of "inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien 'who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.'" *Zadvydas*, 533 U.S. at 688, 121 S. Ct. 2491 (quoting 8 U.S.C. § 1231(a)(6)).

> absence of a hearing before a neutral decisionmaker is substantial. The burden imposed on the government by requiring hearings before an immigration judge at this stage of the proceedings is therefore a reasonable one.

Id. at 1091-92.

With this precedent in mind, we address Appellees' likelihood of success on the merits. Because the legal considerations applicable to the 1226(c) and 1225(b) subclasses differ in some respects, we separately analyze Appellees' likelihood of success with respect to each subclass.

1. The 1226(c) subclass.

In addressing Section 1226(c), we do not write on a blank slate. In *Demore*, an LPR who conceded deportability as an aggravated felon raised a due process challenge to his mandatory detention under § 1226(c). *Demore*, 538 U.S. at 517-18, 523, 123 S. Ct. 1708. The Supreme Court first reviewed at some length Congress's stated reasons for mandating detention of the aliens to whom Section 1226(c) applies, emphasizing concerns about flight and recidivism under the prior regime. *Id.* at 518-21, 123 S. Ct. 1708. Ultimately, the *Demore* majority held that the government was not required to provide individualized determinations of an alien's dangerousness or flight risk to detain him during his removal proceedings. *See id.* at 523-25, 123 S. Ct. 1708. Noting that the *Zadvydas* Court had already held that the government's authority to detain

an alien indefinitely pending removal would be constitutionally doubtful, the *Demore* majority distinguished *Zadvydas* on two principal grounds. *Id.* at 527, 123 S. Ct. 1708 (citing *Zadvydas*, 533 U.S. at 699, 121 S. Ct. 2491). First, while in *Zadvydas* the petitioners challenged their indefinite detention under circumstances where removal was not practicable, thus undermining the government's interest in preventing flight, *see id.* (citing *Zadvydas*, 533 U.S. at 690, 121 S. Ct. 2491), detention under Section 1226(c) "necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed." *Id.* at 528, 123 S. Ct. 1708. Second, *Demore* emphasized that unlike the detention at issue in *Zadvydas*, which had no clear termination point, Section 1226(c) applies only during the pendency of removal proceedings and thus has an inherent end point—the conclusion of proceedings:

> Under § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*. The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. . . . In the remaining 15% of cases, in which the alien appeals the decision of the Immi-

> gration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter.

Id. at 529, 123 S. Ct. 1708 (footnote and citations omitted). The Court thus upheld mandatory detention under § 1226(c), though the concurring opinion of Justice Kennedy—whose vote created a majority—noted that "a lawful permanent resident alien such as respondent could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified." *Id.* at 532, 123 S. Ct. 1708 (Kennedy, J., concurring) (citing *Zadvydas*, 533 U.S. at 684-86, 121 S. Ct. 2491).

We have addressed the question of how broadly *Demore* sweeps in several decisions over the past decade. On each of these occasions, we have consistently held that *Demore*'s holding is limited to detentions of brief duration. *See, e.g., Casas*, 535 F.3d at 950 ("References to the brevity of mandatory detention under § 1226(c) run throughout *Demore*."); *Tijani*, 430 F.3d at 1242 (similar); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1081 (9th Cir. 2006) ("In *Demore*, the Court grounded its holding by referencing a 'brief period' . . . of 'temporary confinement'. . . . There is no indication anywhere in *Demore* that the Court would countenance an indefinite detention.") (citations omitted). We are by no means the only court to interpret *Demore* in this way. For instance, in *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011), the

Third Circuit construed *Demore*, in light of Justice Kennedy's concurrence, as recognizing that "the constitutionality of [mandatory detention] is a function of the length of the detention." *Id.* at 232 ("At a certain point, continued detention becomes unreasonable and the Executive Branch's implementation of § 1226(c) becomes unconstitutional unless the Government has justified its actions at a hearing inquiring into whether continued detention is consistent with the law's purposes of preventing flight and dangers to the community."); *see also Ly v. Hansen*, 351 F.3d 263, 271 (6th Cir. 2003) ("[T]he Court's discussion in Kim is undergirded by reasoning relying on the fact that *Kim*, and persons like him, will normally have their proceedings completed within . . . a short period of time and will actually be deported, or will be released. That is not the case here.").

Thus, it is clear that while mandatory detention under § 1226(c) is not constitutionally impermissible *per se*, the statute cannot be read to authorize mandatory detention of criminal aliens with no limit on the duration of imprisonment. As we held in *Casas*, "the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be constitutionally doubtful." 535 F.3d at 951 (internal quotation marks omitted). Consistent with our previous decisions, we conclude that, to avoid constitutional concerns, § 1226(c)'s mandatory language must be construed "to contain an implicit 'reasonable time' limitation, the application of which is subject to

federal-court review." *Zadvydas*, 533 U.S. at 682, 121 S. Ct. 2491.

The government relies heavily on *Demore* in advancing several arguments that the entry of the preliminary injunction was improper, but none is ultimately persuasive. First, the government directs us to the statutory history of § 1226(c), arguing that by enacting the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Congress intentionally undid provisions of the 1990 and 1991 amendments to the Immigration and Nationality Act ("INA") that previously granted some discretion to the Attorney General to release criminal aliens pending removal. The government cites *Demore*'s observation that Congress's enactment of § 1226(c) hinged on its determination that the flight of aliens released pending removal proceedings, and crimes perpetrated with frequency by those who absconded under the prior regime, were undermining national immigration policy. *See Demore*, 538 U.S. at 518-19, 123 S. Ct. 1708. Moreover, the government argues that the statute's use of the mandatory "shall" plainly contemplates mandatory detention without a bond hearing. It notes that § 1226(a), which was enacted contemporaneously with § 1226(c), uses discretionary language and that § 1226(c)(2) provides for narrow exceptions to mandatory detention for criminal aliens who materially assist law enforcement. These statutes, the government contends, indicate that Congress knew how to provide for release on bond if it wished to do so. Fin-

ally, the government argues that under *Zadvydas* and *Demore*, mandatory detention under 1226(c) without a bond hearing is permissible because such detention has a definite termination point.

We are not convinced by the government's reasoning, which relies on a broad reading of *Demore* foreclosed by our post-*Demore* cases. Despite the Supreme Court's holding that mandatory detention under § 1226(c) without an individualized determination of dangerousness or flight risk is constitutional under some circumstances, our subsequent decisions applying *Demore* make clear that *Demore*'s reach is limited to relatively brief periods of detention. *See Casas*, 535 F.3d at 951. Nothing about the district court's preliminary injunction order requires reading the mandatory detention requirement out of § 1226(c), because "the mandatory, bureaucratic detention of aliens under § 1226(c) was intended to apply for only a limited time," after which "the Attorney General's detention authority rests with § 1226(a)." *Id.* at 948. In other words, the preliminary injunction does not require that anyone held under § 1226(c) receive a bond hearing. Rather, under a fair reading of our precedent, when detention becomes prolonged, § 1226(c) becomes inapplicable. "As a general matter, detention is prolonged when it has lasted six months and is expected to continue more than minimally beyond six months." *Diouf II*, 634 F.3d at 1092 n.13. Therefore, subclass members who have been detained under § 1226(c) for six months are entitled to a bond

hearing because the applicable *statutory* law, not constitutional law, requires one. Thus, while the government may be correct that reading § 1226(c) as anything other than a mandatory detention statute is not a "plausible interpretation[ ] of [the] statutory text," *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005), it does not argue that reading an implicit *temporal limitation* on mandatory detention into the statute is implausible. Indeed, it could not do so, because such an argument is foreclosed by our decisions in *Tijani* and *Casas*.

The government's attempts to distinguish our post-*Demore* authority are unavailing. It is certainly true, as the government notes, that by its terms *Casas* concerned an alien who had received an administratively final removal order, sought judicial review, and obtained a remand to the BIA; thus, it did not expressly apply to aliens awaiting the conclusion of their initial administrative proceedings. But this seems to us a distinction without a difference, and the government does not present a persuasive reason why the same protections recognized in *Casas* should not apply to pre-removal order detainees. "Regardless of the stage of the proceedings, the same important interest is at stake—freedom from prolonged detention." *Diouf II*, 634 F.3d at 1087. Indeed, if anything, because LPRs detained prior to the entry of an administratively final removal order have not been adjudicated removable, they would seem to have a *greater* liberty interest than individuals detained pending judicial

review or the pendency of a motion to reopen before the agency, and thus a greater entitlement to a bond hearing. *See id.* at 1086-87 (suggesting that a detainee who is subject to a final order of removal may have a "lesser liberty interest in freedom from detention").

The government is likewise correct that *Diouf II* by its terms addressed detention under § 1231(a)(6), not § 1226(c) or § 1225(b). But *Diouf II* strongly suggested that immigration detention becomes prolonged at the six-month mark regardless of the authorizing statute. *See, e.g., id.* at 1091-92 ("When detention crosses the six-month threshold and release or removal is not imminent, the private interests at stake are profound."). Even if *Diouf II* does not squarely hold that detention always becomes prolonged at six months, that conclusion is consistent with the reasoning of *Zadvydas*, *Demore*, *Casas* and *Diouf II*, and we so hold.

The government's remaining argument against what it calls "a six-month blanket rule" is that such a rule would be contrary to the decisions of other circuits and to the principle that due process inherently must be determined through case-by-case adjudication. Neither contention is compelling. First, the government cites the Sixth Circuit's decision in *Ly*, 351 F.3d at 271-73, and the Third Circuit's decision in *Diop*, 656 F.3d at 234, both of which declined to establish a brightline time limit on detention without a bond hearing. But both *Diop* and *Ly* held that there are

substantive limits on the length of detention under § 1226(c), and those cases are thus contrary to the government's position that *Demore* permits mandatory detention under § 1226(c) irrespective of duration. To the extent *Diop* and *Ly* reject a categorical time limit, their reasoning in that respect is inapplicable here, both because this petition is a class action (and thus relief will perforce apply to all detainees) and because we already indicated in *Diouf II* that detention is presumptively prolonged when it surpasses six months in duration. More fundamentally, the preliminary injunction does not, as the government claims, "embrace an inflexible blanket approach to due process analysis." Rather, the injunction requires individualized decision-making—in the form of bond hearings that conform to the procedural requirements set forth in Singh. Thus, the 1226(c) subclass members are likely to succeed on the merits.

2. The 1225(b) subclass.

We next address whether the prolonged detention of "applicants for admission" under Section 1225(b) raises the same "serious constitutional concerns" that are implicated by prolonged detention of other detained aliens. The government argues that the 1225(b) subclass members enjoy lesser constitutional protections than other detained aliens. Of course, if the statute does not raise constitutional concerns, then there is no basis for employing the canon of constitutional avoidance. *See Ma v. Ashcroft*, 257 F.3d 1095, 1106-07 (9th Cir. 2001).

The government emphasizes the "unique constitutional position of arriving aliens" to argue that prolonged detention of 1225(b) subclass members does not implicate constitutional concerns. This argument relies principally on *Shaughnessy v. United States ex rel. Mezei* (*Mezei*), 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953) and *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), *superseded by statute as stated in Xi v. I.N.S.*, 298 F.3d 832, 837-38 (9th Cir. 2002). In *Mezei*, the Supreme Court rejected a constitutional challenge to the multi-year detention on Ellis Island of an LPR returning from a 19-month trip abroad. *See* 345 U.S. at 214, 73 S. Ct. 625. Adverting to the now-defunct statutory distinction between "exclusion" and "deportation" proceedings, the Court held that:

> [A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. . . . But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Id. at 212, 73 S. Ct. 625 (internal quotation marks and citations omitted). In *Barrera-Echavarria*, we applied *Mezei* to uphold the constitutionality of prolonged detention of excludable aliens under the pre-IIRIRA version of 8 U.S.C. § 1226(e). 44 F.3d at 1448. We held that the "entry fiction" doctrine, as

explained by the Supreme Court, "squarely precludes a conclusion that [excludable aliens] have a constitutional right to be free from detention, even for an extended time." *Id.* at 1449.

It seems clear that many, if not most, members of the 1225(b) subclass would fall into the category of aliens described in *Mezei* and *Barrera-Echavarria* as entitled to limited due process protection. *See Barrera-Echavarria*, 44 F.3d at 1450 ("*Mezei* established what is known as the 'entry fiction,' which provides that although *aliens seeking admission into the United States* may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country. . . . Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution.") (emphasis added) (internal quotations and citations omitted). Nonetheless, we have reason to question whether *Mezei* and *Barrera-Echavarria* are squarely apposite to the inquiry before us.

First, both cases were decided under pre-IIRIRA law. Because the cases apply to the former category of "excludable aliens," it is not clear that the class of aliens to whom *Mezei* and *Barrera-Echavarria* applied is coextensive with the 1225(b) subclass in this case. As we explained in *Xi*:

> The INA is no longer denominated in terms of "entry" and "exclusion." IIRIRA replaced these terms with the broader concept of "admission." Section 1101(a)(13), which formerly defined "entry" as "any coming of an alien into the United States, from a foreign port or place . . . ," 8 U.S.C. [§] 1101(a)(13) (1994), now defines "admission" to mean "the lawful entry of [an] alien into the United States after inspection and authorization by an immigration officer," 8 U.S.C. [§] 1101(a)(13)(A) (2002). Concomitantly, IIRIRA dropped the concept of "excludability" and now uses the defined term of "inadmissibility." Although the grounds for being deemed inadmissible are similar to those for being deemed excludable, *compare* 8 U.S.C. § 1182 (1994) *with* 8 U.S.C. § 1182 (2002), there are substantial differences between the two statutes.

298 F.3d at 838. Of course, this does not undermine *Barrera-Echavarria*'s reasoning as it relates to aliens in the 1225(b) subclass to whom the entry fiction clearly applies (likely the vast majority). But the Supreme Court has instructed that, where one possible application of a statute raises constitutional concerns, the statute as a whole should be construed through the prism of constitutional avoidance. *See Clark*, 543 U.S. at 380, 125 S. Ct. 716 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must

govern."). Thus, the dispositive question is not whether the government's reading of § 1225(b) is permissible in some (or even most) cases, but rather whether there is any single application of the statute that calls for a limiting construction.[9]

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[9] At oral argument, government counsel contended that the district court record is devoid of any evidence suggesting that members of the 1225(b) subclass include returning LPRs. This argument reveals a fundamental misunderstanding of class actions litigated under Rule 23(b)(2) of the Federal Rules of Civil Procedure, including this one. *See Rodriguez I*, 591 F.3d at 1125-26. "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Wal-Mart Stores, Inc. v. Dukes*, — U.S. —, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). It would be illogical for us to conclude that the government's reading of the statute is permissible just because, by happenstance, there are currently no detainees in the Central District who possess the requisite constitutional status to render ICE's preferred practice illegal. Nor could we countenance such a result in light of the Supreme Court's admonition that, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 380-81, 125 S. Ct. 716. In other words, if the canon of constitutional avoidance requires us to read the statute such that bond hearings are available to individuals who have been detained for six months, then under Clark such hearings must be available to everyone detained under the statute.

Under current law, § 1225(b) applies to some LPRs returning from abroad who have *not* been absent for the prolonged period described in *Mezei*. *See* 8 U.S.C. § 1101(a)(13)(C) (setting forth six categories of LPRs who may be treated as seeking admission, only one of which relates to prolonged absences from U.S. territory).[10] "It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within

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[10] Section 1101(a)(13)(C) provides:

> An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—
>
> (i) has abandoned or relinquished that status,
>
> (ii) has been absent from the United States for a continuous period in excess of 180 days,
>
> (iii) has engaged in illegal activity after having departed the United States,
>
> (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,
>
> (v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or
>
> (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

the protection of the Fifth Amendment," and an LPR whose absence is not prolonged is assimilated to that same constitutional status. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S. Ct. 472, 97 L. Ed. 576 (1953). For instance, an LPR who left the United States briefly to undertake illegal activity abroad, such as alien smuggling, would clearly be included in the 1225(b) subclass; under 8 U.S.C. § 1101(a)(13)(C)(iii), he would be treated as an alien seeking admission on account of having "engaged in illegal activity after having departed the United States." *See United States v. Tsai*, 282 F.3d 690, 696 & n.5 (9th Cir. 2002). But in *Landon v. Plasencia*, 459 U.S. 21, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982), the Supreme Court specifically held that an LPR arrested for alien smuggling upon return from a brief trip abroad is entitled to due process protection, specifically because *Mezei* is inapplicable in such a scenario. *See id.* at 34, 103 S. Ct. 321 (holding that *Mezei* "did not suggest that no returning resident alien has a right to due process," and that "it does not govern this case, for Plasencia was absent from the country only a few days"). As such, it is clear that the 1225(b) subclass includes at least some aliens who are not subject to the entry fiction doctrine, and thus under *Clark* the statute must be construed with these aliens in mind.[11]

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[11] This analysis also disposes of the government's reliance on *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094 (9th Cir. 2004), which involved an individual petition for review brought by an alien who entered the United States without inspection and thus clearly was

This conclusion is buttressed by the fact that the government's position is facially inconsistent with our binding holding in *Nadarajah*. *Nadarajah* concerned an asylum seeker who had been granted relief but who remained detained pending review of his case by the Attorney General. 443 F.3d at 1071-75. Although we examined Nadarajah's claims under the paradigm of *Zadvydas*, and therefore considered only the possibility of "indefinite" (as opposed to "prolonged") detention, we nonetheless held that § 1225(b) is susceptible to a saving construction to avoid constitutional concerns. *See id.* at 1076-78. While this analysis does not directly answer the central question presented by this appeal, i.e. whether bond hearings are required at the six month mark, it does undermine the government's arguments in two important respects. First, the government argues that § 1225(b) is too unambiguous for the doctrine of constitutional avoidance to apply. But it is not clear how this could be so in light of *Nadarajah*, where we have *already* applied the canon to this very statute. Second, and relatedly, the government's argument that there is no due process "floor" for the treatment of aliens subject to § 1225(b) is difficult to reconcile with a binding decision that already construed the statute expressly to avoid constitutional concerns. Thus, read together, *Plasencia*, *Clark*, and *Nadarajah* suggest that we must construe

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subject to the doctrine described in *Mezei* and *Barrera-Echavarria*. *See id.* at 1095, 1097-98.

§ 1225(b) to avoid potential constitutional concerns raised by its application to LPRs who enjoy due process protection.

With this premise in place, the likelihood of success of the 1225(b) subclass is determined by the same analysis applicable to the 1226(c) subclass, which we conclude has demonstrated a likelihood of success. To the extent our holdings in *Tijani*, *Casas*, and *Diouf II* require that we construe mandatory immigration detention authority as time-limited and that bond hearings occur when detention becomes "prolonged," there is no basis for distinguishing between the two sub-classes in this regard. Indeed, if anything it would appear that the LPRs who fall within § 1225(b)'s purview should enjoy *greater* constitutional protections than criminal aliens who have already failed to win relief in their removal proceedings, as in *Casas*. *See Johnson v. Eisentrager*, 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

Appellees suggest two potential ways we could apply the canon of constitutional avoidance in construing

§ 1225(b). First, we could simply read a bond hearing requirement into the statute, as we did with regard to § 1231(a)(6) in the *Diouf* opinions. *See Diouf II*, 634 F.3d at 1089; *Diouf v. Mukasey* (*Diouf I*), 542 F.3d 1222, 1234 (9th Cir. 2008) ("We have specifically construed § 1231(a)(6) to permit release on bond.") (citing *Doan v. I.N.S.*, 311 F.3d 1160, 1162 (9th Cir. 2002)). This first suggestion, however, is problematic. For one thing, this reading would conflict with Department of Homeland Security regulations, at least as applied to some subclass members, because current regulations unambiguously strip IJs of the authority to "redetermine conditions of custody imposed by the Service with respect to" arriving aliens. *See* 8 C.F.R. § 1003.19(h)(2)(i)(B). Moreover, it is difficult to distinguish the statute's language from that of § 1226(c), which also provides that aliens who fall within its scope "shall" be detained and which the Supreme Court has characterized as mandating detention. *See Demore*, 538 U.S. at 513-14, 123 S. Ct. 1708; *compare* 8 U.S.C. § 1226(c)(1) ("The Attorney General shall take into custody any alien who. . . . "), *with id.* § 1225(b)(2)(A) ("[I]f the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained. . . . "). Appellees argue that the existence of the parole scheme itself undermines the government's mandatory construction of the statute, but § 1226(c) also contains a *statutory* exception to mandatory detention. *See* 8 U.S.C. § 1226(c)(2) ("The Attorney General may release an

alien described in paragraph (1) only if the Attorney General decides . . . that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."). If anything, the existence of these narrow and explicit exceptions to both statutes' reach is evidence of their drafters' intent to make detention mandatory in all cases to which the exceptions are inapplicable. Thus, Appellees' first suggested construction is not a "fairly possible" reading of the statute as required for the canon of constitutional avoidance to apply.

Appellees' second suggested construction fares considerably better. Under this approach, we would simply follow *Casas* and hold that, to the extent detention under § 1225(b) is mandatory, it is implicitly time-limited. This approach fits more naturally into our case law, which has suggested that after *Demore*, brief periods of mandatory immigration detention do not raise constitutional concerns, but prolonged detention —specifically longer than six months—does. This reading also has the advantage of uniformity, which the Supreme Court has suggested is an important value in matters of statutory construction. *Cf. Zadvydas*, 533

U.S. at 680, 121 S. Ct. 2491 ("In order to limit the occasions when courts will need to make the difficult judgments called for by the recognition of this necessary Executive leeway, it is practically necessary to recognize a presumptively reasonable period of detention. . . . [F]or the sake of uniform administration in the federal courts, six months is the appropriate period."). Of course, the government's detention authority does not completely dissipate at six months; rather, the mandatory provisions of § 1225(b) simply expire at six months, at which point the government's authority to detain the alien would shift to § 1226(a), which is discretionary and which we have already held requires a bond hearing. *See Casas*, 535 F.3d at 948.

Finally, we note that the discretionary parole system available to § 1225(b) detainees is not sufficient to overcome the constitutional concerns raised by prolonged mandatory detention. Indeed, any argument to that effect is clearly foreclosed by our holding in *Singh*, which held that bond hearings must be held before a neutral IJ with the government bearing the burden of proof by clear and convincing evidence. *See* 638 F.3d at 1203-04. The parole process is purely discretionary and its results are unreviewable by IJs. *Cf. Casas*, 535 F.3d at 949 ("We hold that the government may not detain a legal permanent resident such as Casas for a prolonged period without providing him a neutral forum in which to contest the necessity of his continued detention." (emphasis added)). Moreover, release decisions are based on humanitarian consider-

ations and the public interest, *see* 8 U.S.C. § 1182(d)(5)(A), not whether the alien "is a flight risk or will be a danger to the community." *Singh*, 638 F.3d at 1203 (quoting *Casas*, 535 F.3d at 951). To the extent the principles of *Tijani*, *Casas* and *Diouf II* are applicable to the 1225(b) subclass, the constitutionally grounded hearing requirements set forth in Singh are also applicable. The government does not, and could not, contend that discretionary parole satisfies *Singh*. Thus, Appellees are likely to succeed on the merits of their claim that § 1225(b) must be construed to authorize only six months of mandatory detention, after which detention is authorized by § 1226(a) and a bond hearing is required.

B. Irreparable Harm

Having determined that Appellees are likely to succeed on the merits, we consider the remaining Winter factors. We conclude that, here too, the Winter factors favor Appellees.

Appellees clearly face irreparable harm in the absence of the preliminary injunction. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). Thus, it follows from our conclusion that the government's reading of Sections 1226(c) and 1225(b) raises serious constitutional concerns "that irreparable harm is *likely*, not just possi-

ble" in the absence of preliminary injunctive relief. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

There is no dispute that at least some individuals who would be detained if not provided a bond hearing will be granted conditional release under this injunction. Moreover, the government does not dispute that some subclass members detained under § 1225(b) and § 1226(c) will win relief from removal, further undermining any purported rationale for continued detention. Thus, the preliminary injunction is necessary to ensure that individuals whom the government cannot prove constitute a flight risk or a danger to public safety, and sometimes will not succeed in removing at all, are not needlessly detained. Appellees have therefore clearly shown a risk of irreparable harm.

C. Balance of the Equities

The government provides almost no evidence that it would be harmed in any way by the district court's order, other than its assertion that the order enjoins "presumptively lawful" government activity and is contrary to the plain meaning of the statutes. These arguments are obviously premised on the government's view of the merits because it cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns. *Cf. Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[T]he INS cannot reasonably assert that it is harmed in any legally cognizable

sense by being enjoined from constitutional violations.").[12] Thus, in light of the major hardship posed by needless prolonged detention, we conclude that the balance of the equities favors Appellees.

D. The Public Interest

The government claims that "the government's interest is presumed to be the 'public's interest' in this case." It contends that the public interest is undermined by the heavy burden the injunction places on administrative resources and by the government's potential inability to prepare for bond hearings in time to comply with the district court's order. But the government's arguments are flawed in several respects. First, it cites *Nken v. Holder*, 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009), for the general proposition that the public interest always mili-

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[12] The government also contends that Appellees delayed in bringing their motion for a preliminary injunction. *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."). But the government identifies no prejudice that it has suffered as a result of this delay, and in any event the district court did not abuse its discretion by declining to withhold preliminary relief from a constitutionally suspect government practice on the basis that an injunction should have been requested sooner. Moreover, as Appellees point out, the government declined to seek certiorari in *Diouf II*—on which Appellees' motion relied—only in February of 2012. The parties thereafter engaged in settlement negotiations, which apparently stalled in March. Thus, Appellees' June 2012 preliminary injunction motion was not particularly belated.

tates against enjoining government practices. But *Nken* does not contain any such holding. While the Court observed that there is "always a public interest in prompt execution of removal orders," which "may be heightened by the circumstances . . . if, for example, the alien is particularly dangerous, or has substantially prolonged his stay by abusing the processes provided to him," *id.* at 436, 129 S. Ct. 1749, it did not purport to create a blanket presumption in favor of the government in all preliminary injunction cases. Moreover, the bond hearings that this injunction requires are intended to determine precisely whether each individual alien is dangerous or a flight risk and to permit the conditional release only of those who are not. By its terms, the injunction does not require the government to release anyone. Thus, *Nken* does not support the government's position.

The government's arguments regarding the resources required to implement the injunction are also not compelling. Hundreds of hearings have already occurred under the district court's order, belying any suggestion that the preliminary injunction is prohibitively burdensome. Moreover, even if the government faced severe logistical difficulties in implementing the order—a premise that Appellees dispute—they would merely represent the burdens of complying with the applicable statutes, as construed to avoid practices occasioned by an interpretation of the statutes that risks running afoul of the Constitution. "Generally, public interest concerns are implicated when a consti-

tutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). It stands to reason that the public interest also benefits from a preliminary injunction that ensures that federal statutes are construed and implemented in a manner that avoids serious constitutional questions.

IV.

Contrary to the government's rhetoric, this injunction will not flood our streets with fearsome criminals seeking to escape the force of American immigration law. The district court's narrowly tailored order provides individuals, whose right to be present in the United States remains to be decided, a hearing where a neutral decision-maker can determine whether they might deserve conditional release from the prison-like setting where they might otherwise languish for months or years on end. These hearings simply ensure that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

"[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). While ICE is entitled to carry out its

duty to enforce the mandates of Congress, it must do so in a manner consistent with our constitutional values.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56156

ALEJANDRO RODRIGUEZ, PETITIONER-APPELLANT

v.

JAMES HAYES, IMMIGRATION AND CUSTOMS ENFORCEMENT LOS ANGELES DISTRICT FIELD OFFICER DIRECTOR; GEORGE MOLINAR, CHIEF OF DETENTION AND REMOVAL OPERATIONS, SAN PEDRO DETENTION FACILITY; JANET NAPOLITANO*, SECRETARY, DEPARTMENT OF HOMELAND SECURITY; ERIC H. HOLDER JR., ATTORNEY GENERAL; PAUL WALTERS; LEE BACA, SHERIFF OF LOS ANGELES COUNTY; SAMMY JONES, CHIEF OF THE CUSTODY OPERATIONS DIVISION OF THE LOS ANGELES COUNTY SHERRIFF'S DEPARTMENT, RESPONDENTS-APPELLEES

Argued and Submitted: May 5, 2009
Filed: Aug. 20, 2009
Amended: Jan. 4, 2010

ORDER AND OPINION

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* Janet Napolitano is substituted for her predecessor, Michael Chertoff, as Secretary of the Department of Homeland Security, pursuant to Fed. R. App. P. 43(c)(2).

ORDER

Before: B. FLETCHER, RAYMOND C. FISHER and RONALD M. GOULD, Circuit Judges.

The opinion filed on August 20, 2009 and published at 578 F.3d 1032 (9th Cir. 2009) is hereby amended. The amended opinion is filed simultaneously with this order.

With the amendment, the panel has voted to deny the petition for panel rehearing. Judges Fisher and Gould have voted to deny the petition for rehearing en banc and Judge B. Fletcher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

Accordingly, the petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing or rehearing en banc will be entertained.

OPINION

B. FLETCHER, Circuit Judge:

Petitioner Alejandro Rodriguez ("Petitioner") seeks a writ of habeas corpus on behalf of himself and a class of aliens detained in the Central District of California for more than six months without a bond hearing while engaged in immigration proceedings. Petitioner requests injunctive and declaratory relief providing individual bond hearings to all members of the class.

Petitioner appeals the district court denial without explanation of Petitioner's request to certify the proposed class. Respondents, seeking to fill the gap left by the district court's conclusory order, assert that the district court's denial was justified on any of the following grounds: 1) the proposed class is undefined; 2) the claim of Petitioner is moot; 3) the claims of the proposed class are unripe; 4) class relief is barred by 8 U.S.C. § 1252(f); 5) the court lacks jurisdiction over the claims of the proposed class in light of the holding in *Rumsfeld v. Padilla*; and 6) the proposed class does not meet the requirements of Federal Rule of Civil Procedure 23. We have jurisdiction over this interlocutory appeal pursuant to 28 U.S.C. § 1292. We conclude that none of the grounds offered by Respondents justify denial of class certification and that the class meets the requirements of Rule 23; accordingly, we reverse.

I. Background

Petitioner is a citizen of Mexico who came to the United States at the age of one in 1979. He became a lawful permanent resident eight years later. Petitioner was arrested in April 2004, charged with being removable based on past drug and theft convictions, and detained thereafter by the Department of Homeland Security. Petitioner contested his removability before an immigration judge ("IJ"), who determined he was subject to mandatory removal based on either of his past offenses. The Board of Immigration Appeals ("BIA") reversed the IJ's finding that Petitioner

was removable on the basis of his drug offense, but upheld the IJ's finding that his theft conviction was an aggravated felony requiring removal. Petitioner appealed the BIA's finding that his theft offense constituted an aggravated felony and we stayed his removal pending our decision. The appeal has been held in abeyance pending determination of a separate appeal to the United States Supreme Court. During his detention Petitioner received three custody reviews from Immigration and Customs Enforcement that determined to continue his detention, the latest occurring in September 2006. In conjunction with these reviews, Petitioner received no hearing or notice explaining ICE's decision beyond mention that his Ninth Circuit appeal was pending.[1]

On May 16, 2007, Petitioner filed the current Petition for Writ of Habeas Corpus against the secretaries of the Departments of Homeland Security and Justice, the field office director in the Central District of California for Immigration and Customs Enforcement ("ICE"), and the head officials of various alien detention facilities in the district ("Respondents"). Petitioner seeks relief on behalf of himself and a class of aliens in the Central District of California "who 1) are or will be detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including

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[1] Petitioner also was at one point deemed eligible for release on a bond of $15,000, which Petitioner could not pay. This bond order was later revoked after the BIA determined his appeal.

judicial review, and 2) have not been afforded a hearing to determine whether their prolonged detention is justified." (Pet. for Writ of Habeas Corpus ¶ 39.) Petitioner asserts that the detention of the members of the proposed class is not authorized by statute, and, in the alternative, that if their detention is authorized it violates the Fifth Amendment's guarantee of due process. Petitioner's requested relief includes the certification of the proposed class, appointment of Petitioner's counsel as class counsel, and injunctive and declaratory relief providing all members of the class "constitutionally-adequate individual hearings before an immigration judge . . . , at which Respondents will bear the burden to prove by clear and convincing evidence that Petitioner and each class member is a sufficient danger or risk of flight to justify his detention in light of how long he has been detained already and the likelihood of his case being finally resolved in favor of the government in the reasonably foreseeable future." (Pet. for Writ of Habeas Corpus 21.)

On June 25, 2007 Petitioner filed a Motion for Class Certification, which was opposed by Respondents on the same grounds now raised in this appeal. ICE released Petitioner from detention under an order of supervision approximately a month later pursuant to 8 C.F.R. § 241.4. Respondents subsequently filed a motion to dismiss Petitioner's action on mootness grounds in light of his release.

The district court denied Petitioner's Motion for Class Certification and the Respondents' Motion to

Dismiss on March 19, 2008 in a two-sentence order. Petitioner filed the current appeal of the denial of class certification on July 17, 2008.

II. Standard of Review

We review a district court's decision to deny class certification for abuse of discretion. *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended*, 273 F.3d 1266 (9th Cir. 2001). However, a district court's decision as to class certification is not afforded the "'traditional deference'" when it is not "supported by sufficient findings." *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001)). Here, where the district court made no findings whatsoever in support of its denial of class certification, but the record before us is sufficiently developed, "we may evaluate for ourselves" whether the class should be certified. *Las Vegas Sands*, 244 F.3d at 1161.[2] Respondents contend that we should afford the full deference normally accorded the district court's order on the basis that its findings and reasoning can be derived implicitly from Respondents' opposition to class certification filed below. Respondents, however, offered multiple reasons for denying class certification. We would be engaging in mere guess-

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[2] We do not opine on the appropriate course for the reviewing court when a district court makes some, but insufficient, findings, justifying its class certification determination, as that is not the posture we face here.

work were we to assume the district court relied on any particular reason or reasons. We, therefore, follow *Las Vegas Sands* in reviewing the district court's determination.

III. Definition of Proposed Class

Petitioner seeks to certify a class of detainees who are held pursuant to what Petitioner labels the "general immigration statutes." Respondents assert that Petitioner's use of the phrase "general immigration statutes" creates an undefined class. While not a model of clarity, Petitioner's habeas corpus petition and request for class certification together indicate that "general immigration statutes" refers narrowly to 8 U.S.C. § 1226, 8 U.S.C. § 1225(b), and 8 U.S.C. § 1231(a). Whether 8 U.S.C. § 1182(d)(5)(A) is also included in the definition is ambiguous, as it is only referenced in Petitioner's subsequent filings. This is of no practical importance, however, as Section 1182(d)(5)(A) merely provides for discretionary parole of detainees, which, upon revocation, returns the detainees to the form of legal detention they were in prior to parole. 8 U.S.C. § 1182(d)(5); *see Clark v. Martinez*, 543 U.S. 371, 385-86, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005) (discussing effect of Section 1182(d)(5) on detention status). Hence, we conclude Petitioner's proposed class is adequately defined for certification.

IV. Immigration Detention Statutes

The three immigration detention statutes implicated by the proposed class govern detention of aliens at

different stages of the admission and removal process. 8 U.S.C. § 1225(b) provides for discretionary detention of aliens pending a determination of admissibility.[3] 8 U.S.C. § 1226 provides for both discretionary detention generally and mandatory detention for certain narrow categories of aliens pending a determination of their removability.[4] 8 U.S.C. § 1231(a) provides for manda-

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[3] 8 U.S.C. § 1225(b)(1)(B)(ii) provides:

> If the [asylum] officer determines at the time of the interview [upon arrival in the United States] that an alien has a credible fear of persecution . . . , the alien shall be detained for further consideration of the application for asylum.

8 U.S.C. § 1225(b)(2)(A) provides:

> [I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

[4] 8 U.S.C. § 1226(a) provides:

> On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.

8 U.S.C. § 1226(c) provides:

> The Attorney General shall take into custody any alien who . . . is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, . . . is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title, . . . is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[sic] to a term of imprisonment of at least 1 year, or . . . is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title, when the al-

tory detention of aliens ordered removed during the 90 day removal period and discretionary detention after the end of the removal period.[5] Petitioner's request for relief raises the question of whether prolonged detention without a bond hearing is authorized under any of these statutes and, in the alternative, even if it

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ien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

[5] 8 U.S.C. § 1231(a)(2) provides:

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

8 U.S.C. § 1231(a)(6) provides:

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(1)(C) provides:

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

is authorized, whether such detention is constitutional. These are not new questions for this court. In a series of decisions, the Supreme Court and this court have grappled in piece-meal fashion with whether the various immigration detention statutes may authorize indefinite or prolonged detention of detainees and, if so, may do so without providing a bond hearing. Each decision has undertaken interpretation of the immigration detention statutes against the backdrop of the serious constitutional issues raised by indefinite or prolonged detention. We review these decisions to provide the necessary context to aid in determining the appropriateness of class relief.

A. Discretionary Detention

In *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001), the Supreme Court first took up the question of whether an immigration discretionary detention statute authorized indefinite or prolonged detention. The alien there was detained pursuant to Section 1231(a)(6), authorizing discretionary detention of aliens after the removal period. The Court held that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Id.* at 690. The Court found Section 1231(a)(6) ambiguous as to whether it authorized indefinite detention and, therefore, "interpreting the statute to avoid a serious constitutional threat, . . . conclude[d] that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute." *Id.* at 699. The Court determined

that for six months following the beginning of the removal period an alien's detention was presumptively authorized. *Id.* at 701. However, after that period, "once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing" in order to continue to detain the alien. *Id.* Though *Zadvydas* dealt only with aliens detained pursuant to Section 1231(a)(6) who were removable under Section 1227(a)(1)(C), 1227(a)(2) or 1227(a)(4), the Supreme Court subsequently extended its holding to the other two categories of aliens governed by the statute: aliens inadmissible under Section 1182 and aliens determined by the Secretary of Homeland Security to be a risk to the community or a flight risk. *See Clark*, 543 U.S. at 378, 125 S. Ct. 716; *see also Xi v. INS*, 298 F.3d 832, 834 (9th Cir. 2002). We have further extended the *Zadvydas* framework to discretionary detention pursuant to Section 1225(b) and 1226(a), finding that indefinite detention under these statutes poses the same constitutional concerns present in *Zadvydas*. *See Prieto-Romero v. Clark*, 534 F.3d 1053, 1062-63 (9th Cir. 2008); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-80 (9th Cir. 2006).

Having applied the *Zadvydas* framework to determine when prolonged discretionary detention is authorized, we have also begun to determine what sort of bond hearing, if any, is needed to justify prolonged discretionary detention for individual petitioners. As we stated in *Prieto-Romero*, even when detention is

authorized by statute, "due process requires 'adequate procedural protections' to ensure that the government's asserted justification for physical confinement 'out-weighs the individual's constitutionally protected interest in avoiding physical restraint.'" 534 F.3d at 1065 (quoting *Zadvydas*, 533 U.S. at 690-91, 121 S. Ct. 2491). In *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942, 949-52 (9th Cir. 2008), we determined that Section 1226(a) authorized detention of the petitioner at issue and proceeded to discuss what bond hearing, if any, he was entitled to. We concluded that Section 1226(a) provided authority for the Attorney General to release an alien detained under the section on bond following a bond hearing. *Id.* "Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,'" we further concluded "that § 1226(a) must be construed as requiring the Attorney General to provide the alien with such a hearing." *Id.* (emphasis omitted). Hence, we held that an alien detained under Section 1226(a) "is entitled to release on bond unless the government establishes that he is a flight risk or will be a danger to the community." *Id.* at 951 (internal quotation marks omitted); *see also Flores-Torres v. Mukasey*, 548 F.3d 708, 709 n.2 (9th Cir. 2008); *Prieto-Romero*, 534 F.3d at 1065-66 (finding three bond hearings for Section 1226(a) detainee satisfied due process); *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005) (finding alien detained for nearly three years could not be mandatorily detained under Section 1226(c) and ordering bond

hearing, impliedly finding alien was detained under Section 1226(a)).

In *Diouf v. Mukasey*, 542 F.3d 1222 (9th Cir. 2008), by contrast, we refused to reach the issue of whether a bond hearing was required under Section 1231(a)(6). We held the detention of the petitioner at issue beyond the six month period was authorized under Section 1231(a)(6). *Id.* at 1233. We then turned to the issue of what bond hearing, if any, the petitioner was entitled to for determining the necessity of his detention. We concluded that while release on bond was clearly authorized by Section 1231(a)(6) and its implementing regulations, it was unclear whether a bond hearing was required under the statute for petitioner and what burden if any should be placed on the government at such a hearing. *Id.* at 1234-35. Because the district court had not had an opportunity to reach this question, we declined to reach it in the first instance and remanded. *Id.* at 1235. However, in doing so we noted that the issue was "somewhat similar" to that in *Casas-Castrillon*, strongly implying that the district court's determination should at least be informed by its reasoning. *Diouf*, 542 F.3d at 1234-35.

B. Mandatory Detention

We have also dealt with indefinite or prolonged detention under immigration mandatory detention provisions, including Sections 1226(c), 1231(a)(2), and 1231(a)(1)(c). Section 1226(c) provides for mandatory detention of criminal aliens for expedited removal. The Supreme Court has held that detention pursuant

to Section 1226(c) does not raise any due process concerns. *Demore v. Kim*, 538 U.S. 510, 531, 123 S. Ct. 1708, 155 L. Ed. 2d 724 (2003). However, in upholding Section 1226(c), the Court interpreted it to authorize mandatory detention only for the "limited period of [the alien's] removal proceedings," which the Court estimated "lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal" his removal order to the BIA. *Id.* at 530-31, 123 S. Ct. 1708. We have subsequently clarified that, in order to avoid the serious constitutional questions raised by indefinite mandatory detention, detention of an alien beyond an expedited period ceases to be mandatory under Section 1226(c) and instead becomes discretionary under Section 1226(a). *See Casas-Castrillon*, 535 F.3d at 951; *Tijani*, 430 F.3d at 1242.

We have additionally held that detention pursuant to Section 1231(a)(2) poses no due process issues, regardless of whether removal of the detained alien is foreseeable, because the statute authorizes detention for only the ninety-day removal period and therefore does not create any danger of unconstitutionally indefinite detention. *Khotesouvan v. Morones*, 386 F.3d 1298, 1299-1301 (9th Cir. 2004). We have taken the same view when an alien is detained pursuant to the related provision of 8 U.S.C. § 1231(a)(1)(C), which allows the removal period to be extended and detention to continue beyond ninety days if an alien conspires or acts to prevent his own removal. *Pelich*

v. INS, 329 F.3d 1057, 1058-61 (9th Cir. 2003). The court, while "expressly declin[ing] to endorse or reject any inferred *Zadvydas*-inspired limitation to § 1231(a)(1)(C)" found that, in any case, "an alien cannot assert a viable constitutional claim when his indefinite detention is due to his failure to cooperate with the INS's efforts to remove him." *Id.* at 1060-61; *see also Lema v. INS*, 341 F.3d 853, 857 (9th Cir. 2003) ("We conclude that 8 U.S.C. § 1231(a)(1)(C) . . . authorizes the INS's continued detention of a removable alien so long as the alien fails to cooperate fully and honestly with officials to obtain travel documents.") Key to this determination was the court's view that "[t]he risk of indefinite detention that motivated the Supreme Court's statutory interpretation in *Zadvydas* does not exist when an alien is the cause of his own detention." *Pelich*, 329 F.3d at 1060.

V. Alleged Bars to Class Relief

Petitioner seeks to end our piecemeal rulings in habeas actions on the necessity of bond hearings to justify prolonged detention in the immigration context and have the courts address the issue on a class-wide basis across the various general immigration detention statutes. While "ordinarily disfavored," the Ninth Circuit has recognized that class actions may be brought pursuant to habeas corpus. *Cox v. McCarthy*, 829 F.2d 800, 804 (9th Cir. 1987); *see also Mead v. Parker*, 464 F.2d 1108, 1112-13 (9th Cir. 1972) (finding habeas relief to be appropriate in cases "where the relief sought can be of immediate benefit to a large and amorphous group"). Respondents assert, nonethe-

less, that various constitutional, statutory, and procedural bars to class relief exist in this case.

A. Mootness

Respondents initially challenge class certification on the ground that Petitioner's individual claim has been rendered moot by his release from detention. In fact, mootness of the Petitioner's claim is not a basis for denial of class certification, but rather is a basis for dismissal of Petitioner's action. Because the district court did not dismiss Petitioner's action, but only denied class certification, we see no reason to conclude it based its denial on a finding of mootness. If it had made such a finding, it would have been in error. Petitioner was released pursuant to 8 C.F.R. § 241.4, which provides that "[t]he Executive Associate Commissioner shall have authority, in the exercise of discretion, to revoke release and return to Service custody an alien previously approved for release under the procedures in this section." 8 C.F.R. § 241.4(*l*)(2). While the regulation provides the detainee some opportunity to respond to the reasons for revocation, it provides no other procedural and no meaningful substantive limit on this exercise of discretion as it allows revocation "when, in the opinion of the revoking official . . . [t]he purposes of release have been served . . . [or][t]he conduct of the alien, or *any other circumstance*, indicates that release would no longer be appropriate." *Id.* § 241.4(*l*)(2)(i), (iv) (emphasis added). This places Petitioner in a position analogous to the petitioner challenging his prolonged detention in

Clark v. Martinez, who was released from detention pursuant to a discretionary parole provision while his suit was ongoing. The Supreme Court found his case was not mooted:

> If Benitez is correct, as his suit contends, that the Government lacks the authority to continue to detain him, he would have to be released, and could not be taken back into custody unless he violated the conditions of . . . or his detention became necessary to effectuate his removal. . . . His current release, however, is not only limited to one year, *but subject to the Secretary's discretionary authority to terminate.* . . . Thus, Benitez continue[s] to have a personal stake in the outcome of his petition.

Clark, 543 U.S. at 376 n.3, 125 S. Ct. 716 (citations and internal quotation marks omitted) (emphasis added). Petitioner asserts that the government cannot detain him unless it can demonstrate by clear and convincing evidence at a hearing before an immigration judge that he is a sufficient danger or flight risk to justify his detention. If Petitioner is successful in his petition he would be entitled to such a hearing where the government would need to meet its burden or offer him a nondiscretionary release until such time as it can make the requisite showing or has an independent statutory basis to detain him. This would place Petitioner in a far different situation from his current one, released pursuant to the government's independent determination but subject to revocation on the government's

discretion without hearing before a neutral decision-maker and without burden of justification on the government. Hence, like the petitioner in *Clark*, Petitioner here retains a personal stake in the determination of his claim such that it is not moot.

We further note that Petitioner's current release is subject to a number of restrictions, including the requirements that he remain within 50 feet of his home from 7:00 p.m. to 7:00 a.m. every night and wear an ankle monitoring device at all times. Petitioner proposes that he receive a bond hearing to determine not only whether he should be released, but also under what conditions such release would take place. The strict limitations on Petitioner's freedom, therefore, provide an additional reason why his case presents a live controversy. *Cf. Carafas v. LaVallee*, 391 U.S. 234, 238, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968) (holding that when habeas petitioner was released from custody, but his felony conviction prevented him from engaging in certain businesses, voting, and serving on juries, underlying habeas case still presented live controversy).

B. Ripeness

Respondents additionally argue that class certification must be denied because the claims of the proposed class are not all yet ripe.[6] "[A] claim is not ripe for

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[6] Respondents assert that Petitioner waived any challenge to their ripeness argument by not raising it in his opening brief. This argument is groundless. We have previously held that the failure of a party in its opening brief to challenge an alternate

adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009) (internal quotation marks omitted). Respondents first argue that the claims of proposed class members detained pursuant to Section 1226(a) are unripe because there is no indication yet that the government is refusing to comply with *Casas-Castrillon*'s ruling. This argument rests on a misunderstanding of what constitutes membership in the proposed class. Members of the proposed class are by definition aliens who have been detained without a bond hearing. If an alien who would otherwise be a member of the class receives a bond hearing pursuant to *Casas-Castrillon* or any other ruling they would cease to be a member of the class. Hence, the government's full compliance with *Casas-Castrillon* could reduce the size of the class, but it could not render the claims of class members unripe. Respondents additionally argue that the proposed class suffers from ripeness issues because it references future class members. The inclusion of future class members in a class is not itself unusual or objectionable. *See, e.g.*,

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ground for a district court's ruling *given by the district court* waives that challenge. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005); *MacKay v. Pfeil*, 827 F.2d 540, 542 n.2 (9th Cir. 1987). Here, the district court did not cite ripeness or any other rationale for its denial of certification. Petitioner does not waive a challenge to any ground for denial of certification in its opening brief on appeal that was not relied on in the district court's order.

Probe v. State Teachers' Ret. Sys., 780 F.2d 776, 780 (9th Cir. 1986); *LaDuke v. Nelson*, 762 F.2d 1318, 1321-26 (9th Cir. 1985). When the future persons referenced become members of the class, their claims will necessarily be ripe. Hence, we conclude that the requirement of ripeness raises no bar to certification of the class.

C. 8 U.S.C. § 1252(f)

Respondents assert that 8 U.S.C. § 1252(f)(1), Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), bars class certification in this case.[7]

Section 1252(f)(1) provides:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this sub-chapter, as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). Part IV includes 8 U.S.C. §§ 1221-1231. *See Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc). Respondents argue that Section 1252(f) bars the pro-

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[7] We expand our explanation of our disagreement with Respondents to more fully respond to its petition for rehearing.

posed class from receiving any injunctive relief, thereby requiring denial of class certification.

Respondents are doubly mistaken. Section 1252(f) cannot bar certification of the class unless it bars the proposed class from receiving any class relief. It is simply not the case that Section 1252(f) bars Petitioner from receiving declaratory relief on behalf of the class. The Supreme Court has recognized as much: "By its plain terms, and even by its title, [Section 1252(f)] is nothing more or less than a limit on injunctive relief. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481-482, 119 S. Ct. 936, 142 L. Ed. 2d 940 (9th Cir. 1999).

Nor do we agree with Respondents that Section 1252(f)'s "enjoin or restrain" should be interpreted to have the same scope as a different phrase, "enjoin, suspend or restrain," in the Tax Injunction and Johnson Acts, 28 U.S.C. §§ 1341 and 1342. "[E]njoin," "suspend," and "restrain" should each be read to have independent operative meaning, and the conspicuous absence of "suspend" suggests that Congress intended Section 1252(f)'s scope to be more limited than the Tax Injunction and Johnson Acts. *See California v. Grace Brethren Church*, 457 U.S. 393, 408, 102 S. Ct. 2498, 73 L. Ed. 2d 93 (1982) (holding that the Tax Injunction Act prohibits both declaratory and injunctive relief because declaratory relief "may in every practical

sense operate to *suspend* collection of state taxes until the litigation has ended" (emphasis added)). The term "restrain" need not encompass declaratory relief in order to have a meaning independent from "enjoin." We follow the First Circuit in concluding that "restrain" in Section 1252(f) is best read to refer to temporary injunctive relief. *See Arevalo v. Ashcroft*, 344 F.3d 1, 7 (1st Cir. 2003) ("The most sensible way to give operative effect to both words in this statutory scheme is to treat the word 'enjoin' as referring to permanent injunctions and the word 'restrain' as referring to temporary injunctive relief. . . . ").

But it is the text of the IIRIRA itself that most clearly shows that Section 1252(f) was not meant to bar classwide declaratory relief. Congress knew how to say "declaratory relief" in enacting the IIRIRA, but it chose not to use it in Section 1252(f). *Cf.* 8 U.S.C. § 1252(e)(1)(A) (prohibiting courts from entering "declaratory, injunctive, or other equitable relief" in any action to exclude under 8 U.S.C. § 1225(b)(1)). "[E]njoin or restrain" should not be read to include declaratory relief when Congress could easily have included "declaratory relief" explicitly had it chosen to do so. *Cf. Hor v. Gonzales*, 400 F.3d 482, 484 (7th Cir. 2005) ("Our legal vocabulary contains distinct words for distinctive judicial actions. Keeping them separate makes it easy to address one, both, or neither, in a statute such as the IIRIRA.").

Respondents protest, however, that declaratory relief is as a practical matter equivalent to injunctive

relief, and that allowing classwide declaratory relief allows an "end run" around the scheme Congress designed. The first problem with this argument is that declaratory relief has long been recognized as distinct in purpose from and "milder" in remedy than injunctions. *Steffel v. Thompson*, 415 U.S. 452, 466-67, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974). Unlike injunctions, declaratory judgments do not impose affirmative obligations that are backed by a contempt sanction. *Id.* at 471, 94 S. Ct. 1209. The second problem with Respondents' "end run" argument is that litigants under Section 1252(f) *already have* an end run around the injunction prohibition: filing individual lawsuits. The issue is not whether declaratory relief might make possible an end run around Section 1252(f), but whether classwide declaratory relief is a congressionally contemplated part of the statutory scheme. As we have explained, we believe that it is.

In addition, we conclude that Section 1252(f) does not bar injunctive relief for the proposed class. Section 1252(f) prohibits only injunction of "the operation of" the detention statutes, not injunction of a violation of the statutes. This is a distinction we have made before in a decision vacated on unrelated grounds. *See Ali v. Ashcroft*, 346 F.3d 873, 886 (9th Cir. 2003), *vacated on unrelated grounds sub nom. Ali v. Gonzales*, 421 F.3d 795 (9th Cir. 2005). We held there:

> "[Section] 1252(f)(1) limits the district court's authority to enjoin the INS from carrying out legitimate removal orders. Where, however, a peti-

> tioner seeks to enjoin conduct that allegedly is not even authorized by the statute, the court is not enjoining the operation of part IV of subchapter II, and § 1252(f)(1) therefore is not implicated."

Id. Analogously, Petitioner here does not seek to enjoin the operation of the immigration detention statutes, but to enjoin conduct it asserts is not authorized by the statutes. Petitioner argues only that the immigration detention statutes, to the extent they cannot be interpreted as requiring provision of a bond hearing, must be enjoined as unconstitutional. However, as this latter argument for relief may never be reached, it cannot be a basis for denial of class certification.

The reasoning of *Ali* is bolstered by a long established canon of statutory interpretation. Because equitable powers are an inherent part of the "judicial power" committed to the federal courts by Article III, *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 460, 462, 15 L. Ed. 449 (1855), traditional equitable powers can be curtailed only by an unmistakable legislative command. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S. Ct. 1086, 90 L. Ed. 1332 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). It is hardly a "necessary and inescapable inference" from the language of Section 1252(f) that a

district court is prohibited from enjoining a violation or misapplication of the detention statutes.

Respondents assert that we should not adopt the reasoning of the vacated opinion in *Ali*, but instead follow our decision in *Catholic Soc. Servs., Inc. v. INS*, 182 F.3d 1053 (9th Cir. 1999), *aff'd in part and rev'd in part en banc*, 232 F.3d 1139 (9th Cir. 2000). There we found that injunctive relief for a class asserting that the INS misinterpreted legalization provisions of the Immigration Control and Reform Act was barred by Section 1252(f). We stated:

> [R]egardless of the fact that the injunction provides relief for a harm ostensibly created by the INS' misinterpretation of the legalization provisions of part V, insofar as it would interfere with the operation of part IV, the injunction here is contrary to the plain language of § 1252(f) and the district court lacked the jurisdiction to enter it.

Id. at 1062. We subsequently reversed this conclusion on en banc review, however, on the basis that the ordered injunction was issued under part V of the subchapter, rather than part IV and, therefore, not within the terms of Section 1252(f). *Catholic Soc. Servs.*, 232 F.3d at 1150. Were we nonetheless to accept the panel's reasoning as persuasive, it would not control here. The requested injunction at issue does not seek to enjoin the operation of Part IV provisions to relieve harm caused by misinterpretation of other statutory provisions, but to enjoin conduct alleged not to be authorized by the proper operation of

Part IV provisions. The sound reasoning of *Ali* persuades that this is not barred by the plain terms of Section 1252(f).[8]

D. Rumsfeld v. Padilla

Finally, Respondents claim that the Supreme Court's holding in *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004), renders class action relief inappropriate in this case. In *Padilla*, the Supreme Court stated that "longstanding practice confirms that in habeas challenges to present physical confinement-'core challenges'-the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Id.* at 435, 124 S. Ct. 2711. Respondents argue that this statement mandates that the proper respondents for members of the proposed class are the various wardens overseeing their individual custody. Respondents assert that this renders class relief impossible because, "at a jurisdictional minimum," all proposed class members must be under the immediate supervision of the same custodian. (Resp'ts Answering Br. 16.) Respondents fail to recognize that *Padilla* specifically reserved the question of whether the

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[8] Petitioner additionally argues that Section 1252(f) properly interpreted does not apply to claims for habeas relief at all. We do not reach this argument at this time, as it is sufficient to find that the district court may in some scenario grant the proposed class some of the relief sought to determine that the class may be certified.

proper respondent in habeas challenges brought by "an alien detained pending deportation" would be the immediate custodian of the alien. *Padilla*, 542 U.S. at 436 n.8, 124 S. Ct. 2711. We need not reach it because, even were the Supreme Court's statement in *Padilla* applicable here, Respondents' argument is baseless. Respondents cite no authority or rationale for the proposition that we do not have jurisdiction to provide class relief in a habeas corpus action that meets the requirements for certification merely because class members are in the immediate custody of different facilities. Such actions have been maintained previously against single and multiple respondents. *See Schall v. Martin*, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (class of juveniles sought habeas corpus relief from pretrial detention under state law); *U.S. ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974) (class of young adults sought habeas corpus relief from serving terms in state reformatories). Regardless of who the proper respondents for the class are, we conclude certification of the class will not pose any jurisdictional concerns.

VI. Rule 23

In addition to raising various bars to class relief, Respondents assert that the proposed class fails to comply with the requirements of Federal Rule of Civil Procedure 23, governing class certification. Rule 23(a) provides that a class may be certified only if:

> (1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The party seeking certification must meet all of these requirements and Rule 23(b) further provides that for certification the class must fall into one of three categories. *Zinser*, 253 F.3d at 1186 ("[T]he party seeking class certification . . . bears the burden of demonstrating that she has met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)."). Petitioner seeks certification under the category provided for in Rule 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Respondents challenge the proposed class's compliance with all aspects of Rule 23 except the numerosity requirement, which Respondents concede is met. We discuss the proposed class's compliance with the remaining requirements individually.

A. Commonality

The commonality requirement "serves chiefly two purposes: (1) ensuring that absentee members are

fairly and adequately represented; and (2) ensuring practical and efficient case management." *Walters v. Reno*, 145 F.3d 1032, 1045 (9th Cir. 1998). We have construed this requirement "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). It is not necessary that "[a]ll questions of fact and law . . . be common to satisfy the rule." *Id.* We have found "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.*; *see, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact."); *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class."). Nor does "common" as used in Rule 23(a)(1) mean "complete congruence." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 990 (9th Cir. 2006). We find the claims of the class share sufficiently common questions of law to meet the requirement of Rule 23(a)(1).

Respondents challenge the commonality of class members' claims on the ground that class members suffer detention for different reasons and under the authority of different statutes. Respondents assert that, as a result, the question of whether individual class members' detention may be continued without a bond hearing turns on divergent questions of statutory interpretation and consideration of different factual

circumstances. Respondents are undoubtedly correct that members of the proposed class do not share every fact in common or completely identical legal issues. This is not required by Rule 23(a)(1). Instead, the commonality requirements asks us to look only for some shared legal issue or a common core of facts. This the proposed members of the class certainly have. In each case in which we have interpreted the scope of various statutes providing for both discretionary and mandatory detention in the immigration context, our determinations have been guided, if not controlled, by the question of whether indefinite or prolonged detention generating serious constitutional concerns is present. A form of that question is posed here: may an individual be detained for over six months without a bond hearing under a statute that does not explicitly authorize detention for longer than that time without generating serious constitutional concerns? This question will be posed by the detention of every member of the class and their entitlement to a bond hearing will largely be determined by its answer. *See Casas-Castrillon*, 535 F.3d at 951 ("Because the prolonged detention of an alien without an individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' we hold that § 1226(a) must be construed as requiring the Attorney General to provide the alien with such a hearing." (emphasis omitted)); *Tijani*, 430 F.3d at 1242 (interpreting statutory framework to provide bond hearing because "it is constitutionally doubtful that Congress may authorize imprisonment of this duration for lawfully admitted

resident aliens who are subject to removal."). The nature of the particular statute authorizing the detention of individual class members will play some role in determining whether class members are entitled to relief, as well. Nonetheless, the constitutional issue at the heart of each class member's claim for relief is common.

We also note that a finding of commonality here serves the purposes of the requirement. Answering comprehensively in a class setting the constitutional question that is at the center of the proposed class's claims will facilitate development of a uniform framework for analyzing detainee claims to a bond hearing. This would render management of these claims more efficient for the courts. It would also benefit many of the putative class members by obviating the severe practical concerns that would likely attend them were they forced to proceed alone. In many of the cases where we have adjudicated these immigration detention claims, the petitioner had been detained well beyond six months, the point at which counsel contends that the putative class members should be entitled to a bond hearing. *See, e.g., Tijani*, 430 F.3d at 1242 (9th Cir. 2005) (ordering a bond hearing after an alien was detained for nearly three years). Without certification, therefore, many of the putative class members likely would not be able to adjudicate their claimed need of a bond hearing after six months of detention—that claim would become moot before the district court could come to a decision. Thus, for many of the puta-

tive class members, class treatment in this case is likely necessary to provide the remedy sought.

To the extent there may be any concern that the differing statutes authorizing detention of the various class members will render class adjudication of class members' claims impractical or undermine effective representation of the class, it may counsel the formation of subclasses. *See* Fed. R. Civ. P. 23(c)(5); *Marisol A.*, 126 F.3d at 378-79 (finding subclasses appropriate where groups of class members each had "separate and discrete legal claims pursuant to particular federal and state constitutional, statutory, and regulatory obligations of the defendants"). Because the possibility of subclasses was not raised below, we leave it to the district court to reach it in the first instance. The parties may submit proposals for formation of subclasses on remand and the district court shall exercise its discretion to determine whether adoption of any proposal would be appropriate. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 407-08, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (holding that court of appeals may order district court to consider any proposals for subclasses made on remand). The district court, however, should not lose sight of the overarching issue: The circumstances, if any, that would warrant prolonged detention without hearing.

B. Typicality

The typicality requirement looks to whether "the claims of the class representatives [are] typical of those of the class, and [is] 'satisfied when each class

member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) (quoting *Marisol A.*, 126 F.3d at 376). Like the commonality requirement, the typicality requirement is "permissive" and requires only that the representative's claims are "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. We conclude that Petitioner's claim for a bond hearing is reasonably co-extensive with the claims of the class. Though Petitioner and some of the other members of the proposed class are detained under different statutes and are at different points in the removal process and hence do not raise identical claims, they all, as already discussed, raise similar constitutionally-based arguments and are alleged victims of the same practice of prolonged detention while in immigration proceedings. *Cf. Armstrong*, 275 F.3d at 869 (finding typicality where class representatives suffered with rest of class "a refusal or failure to afford them accommodations as required by statute, and [were] objects of discriminatory treatment on account of their disabilities" in parole and parole revocation proceedings).

Respondents argue that Petitioner's claims are not typical of the class because of his supervised release and because of his aggravated felon status, currently under appeal. Both are immaterial. The single relevance Petitioner's supervised release has to his claim is to whether it renders Petitioner's claim moot.

Defenses unique to a class representative counsel against class certification only where they "threaten to become the focus of the litigation." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks and citation omitted). We have determined that Petitioner's supervised release does not moot his claim and, therefore, no mootness defense particular to him will interfere with the ongoing class litigation.

Petitioner's aggravated felon status is similarly of no significance to the typicality analysis. The claims of Petitioner and the class on the whole are that they are entitled to a bond hearing in which dangerousness and risk of flight are evaluated. While Petitioner's criminal history is currently central to the question of whether Petitioner will ultimately be removed and will almost certainly be relevant to any bond hearing determination, the determination of whether Petitioner is *entitled* to a bond hearing will rest largely on interpretation of the statute authorizing his detention. The particular characteristics of the Petitioner or any individual detainee will not impact the resolution of this general statutory question and, therefore, cannot render Petitioner's claim atypical.

C. Adequacy

"Whether the class representatives satisfy the adequacy requirement depends on 'the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit

is collusive.'" *Walters*, 145 F.3d at 1046 (quoting *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)). Petitioner alleged the qualifications of his counsel and the lack of conflict or collusion in the court below. Respondents do not question these allegations. Instead, they challenge Petitioner's adequacy only by reasserting their commonality and typicality arguments. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (noting that commonality and typicality concerns also relate to a representative's adequacy). As we do not find that these arguments have merit, Respondents have provided no reason to conclude that class certification is properly denied for the reason that Petitioner is an inadequate class representative.

D. Rule 23(b)(2)

Respondents challenge certification under Rule 23(b)(2) on grounds parallel to their challenge under Rule 23(a). Respondents assert that as class members are potentially detained pursuant to different statutes, Respondents have not refused to act or acted on grounds generally applicable to the class. In particular, Respondents note that some class members may not ultimately be entitled to a bond hearing because they are properly subject to mandatory detention and that the regulations currently implementing the various discretionary detentions statutes provide for a different burden of proof at bond hearings than that found to be required by us in *Casas-Castrillon* for aliens detained pursuant to Section 1226(a).

Respondents' contentions miss the point of Rule 23(b)(2). "Class certification under Rule 23(b)(2)" requires that "the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. The rule does not require us to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them. As we have previously stated, "it is sufficient" to meet the requirements of Rule 23(b)(2) that "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047; *see Alliance to End Repression v. Rochford*, 565 F.2d 975, 979 (7th Cir. 1977) (finding Rule 23(b)(2) met despite "individual qualities of [the] suit" because of "pattern or practice characteristic of defendants' conduct that is generally applicable to the class" (internal quotation marks omitted)). The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2). *Walters*, 145 F.3d at 1047; *cf. Gibson v. Local 40, Supercargoes and Checkers*, 543 F.2d 1259, 1264 (9th Cir. 1976) ("A class action may be maintained under [Rule] 23(b)(2), alleging a general course of racial discrimination by an employer or union, though the discrimination may have . . . affect[ed] different members of the class in different ways. . . . ") Furthermore, unlike actions brought under one of the other 23(b) prongs, "questions of manageability and judicial economy are . . . irrelevant to 23(b)(2) class

actions." *Forbush v. J.C. Penney Co., Inc.*, 994 F.2d 1101, 1105 (5th Cir. 1993); *see Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) ("By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a(b)(3), not a(b)(2), class action."), *aff'd in pertinent part and rev'd in part sub nom. Califano v. Yamasaki*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). The proposed members of the class each challenge Respondents' practice of prolonged detention of detainees without providing a bond hearing and seek as relief a bond hearing with the burden placed on the government. The particular statutes controlling class members' detention may impact the viability of their individual claims for relief, but do not alter the fact that relief from a single practice is requested by all class members. Similarly, although the current regulations control what sort of process individual class members receive at this time, all class members' seek the exact same relief as a matter of statutory or, in the alternative, constitutional right. Hence, we conclude that the proposed class meets the requirements of Rule 23(b)(2). *Cf. Walters*, 145 F.3d at 1047 (certifying under Rule 23(b)(2) class of aliens seeking declaratory and injunctive relief on ground that they received constitutionally deficient notice of deportation procedures following charges of document fraud); *Marisol A.*, 126 F.3d at 378 (certifying under Rule 23(b)(2) class of children seeking declaratory and injunctive relief from systemic failures in child welfare

system despite differing harms experienced by class members).

VII. Conclusion

Having found that none of the bars to class relief raised by Respondents prevent certification of the proposed class and that the class meets the requirements of Rule 23, we reverse the district court's denial of class certification and we remand for further proceedings. We leave to the district court's discretion the question of whether formation of subclasses would be appropriate

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES DISTRICT COURT
C.D. CALFORNIA, WESTERN DIVISION

No. CV 07-3239 TJH (RNBx)

ALEJANDRO RODRIGUEZ, ET AL., PETITIONERS

v.

ERIC HOLDER, ET AL., RESPONDENTS

Aug. 6, 2013

ORDER, JUDGMENT AND PERMANENT INJUNCTION

TERRY J. HATTER, JR., Senior District Judge.

The Court has considered Petitioners' motion to clarify the class definition and the cross motions for summary judgment together, with moving and opposing papers.

The Court certified the class in this case after the Ninth Circuit held that the class must be certified. *Rodriguez v. Hayes (Rodriguez I)*, 591 F.3d 1105 (9th Cir. 2010). The class is defined as:

> All non-citizens within the Central District of California who: (1) Are or were detained for longer than six months pursuant to one of the general immigration

> detention statutes pending completion of removal proceedings, including judicial review; (2) Are not and have not been detained pursuant to a national security detention statute; and (3) Have not been afforded a hearing to determine whether their detention is justified.

"General immigration statutes" in the class definition refers to 8 U.S.C. §§ 1225(b), 1226 and 1231(a). *See Rodriguez I*, 591 F.3d at 1113. "Removal proceedings" does not narrowly refer to its use in 8 U.S.C. § 1229a, but to any proceedings to determine whether persons detained pursuant to the general immigration statutes, as defined in *Rodriguez I*, will be removed from the United States.

For organizational purposes, the class is divided into four subclasses, as follows:

1. Class members detained under 8 U.S.C. § 1225(b);
2. Class members detained under 8 U.S.C. § 1226(a);
3. Class members detained under 8 U.S.C. § 1226(c); and
4. Class members detained under 8 U.S.C. § 1231(a).

The Court provided for no exceptions to the definitions of class membership, yet Respondents have unilaterally excluded certain detainees. Consequently,

It is Ordered that there are no exceptions, express or implied, to the class membership definitions.

It is further Ordered that class membership includes, *inter alia*, detainees incarcerated for restatement under 8 U.S.C. § 1231(a)(5), detainees held for proceedings initiated by an administrative removal order under 8 U.S.C. § 1228(b); and detainees held under the general immigration statutes after entering the United States through the Visa Waiver Program.

There are no genuine issues of material fact, and neither party contests that those detained under § 1231 or § 1226(a) have a right to a bond hearing after six months of detention. Most of Respondents's arguments were previously addressed by this Court and affirmed by the Circuit in *Rodriguez v. Robbins (Rodriguez II)*, 715 F.3d 1127 (9th Cir. 2013). However, Respondents raises one new argument. Respondents argue that constitutional concerns are not implicated because the *Rodriguez II* panel did not consider evidence that "a large number of aliens" extend the term of their own detention through their own actions, such as requests for continuances. For this argument, Respondents rely on *Demore v. Kim*, 538 U.S. 510, 526, 123 S. Ct. 1708, 1719, 155 L. Ed. 2d 724, —, 155 L. Ed. 724, 739 (2003), which the Ninth Circuit explicitly construed to only support brief periods of detention. *Rodriguez II*, 715 F.3d at 1135.

The procedural requirements for bond hearings are well settled in the Ninth Circuit. *See Casas-Castrillon v. Department of Homeland Security*, 535 F.3d 942 (9th Cir. 2008). In *Rodriguez II*, the Ninth Circuit reaffirmed that the procedural requirements for a *Casas* bond hearing are those articulated in *Singh v. Holder*, 638 F.3d 1196,

1203-10 (9th Cir. 2011). *Rodriguez II*, 715 F.3d at 1135-36. The government must prove by clear and convincing evidence that a detainee is a flight risk or a danger to the community to justify the denial of bond at a *Casas* hearing. *Rodriguez II*, 715 F.3d at 1136. Additionally, due process requires a contemporaneous record of Casas hearings, so that a transcript or audio recording is available upon request. *Rodriguez II*, 715 F.3d at 1136.

Petitioners, now, request four additional procedural safeguards. First, Petitioners request that an Immigration Judge be required to consider whether the detainee will ever be removed. Second, Petitioners request that an Immigration Judge be required to consider conditions short of incarceration. Third, Petitioners request that the bond hearings be automatically provided, rather than placing the burden on the detainee to request the hearing. Finally, Petitioners request that notice of the hearing be provided to each detainee in plain language, reasonably calculated to inform a person unfamiliar with English and the United States legal system of the pendency of the hearing.

The first and second proposed procedural additions—consideration of the likelihood of removal during a bond hearing, and consideration of alternatives to incarceration—fall outside the ambit of *Casas*, *Singh*, and *Rodriguez II*. *Rodriguez II* affirmed that the purpose of a *Casas* bond hearing is to determine a detainee's flight risk and dangerousness. *Rodriguez II*, 715 F.3d at 1135-36. Accordingly, Petitioners' request that Immigration Judges consider the likelihood of detainees' ultimate re-

moval as a factor at bond hearings would drastically expand the scope and purpose of bond hearings. Such a requirement would require legal and political analyses beyond what would otherwise be considered at a bond hearing, and would place an unreasonable burden on overly burdened Immigration Judges. As to the second request, Immigration Judges should already be considering restrictions short of incarceration, including house arrest with electronic monitoring, in determining a detainee's flight risk and dangerousness. *Rodriguez II*, 715 F.3d at 1131.

On the other hand, Petitioners' request that the bond hearings be provided automatically and that the notice to detainees of the bond hearings be provided in plain language are consistent with the due process concerns of *Casas*, *Singh*, and *Rodriguez II*. The bond hearing process would be fraught with peril if the Court were to place the burden on detainees to request a bond hearing when the government is constitutionally obligated to provide those hearings. Accordingly, comprehendible notice must be provided to detainees for that notice to pass constitutional review.

Petitioners are entitled to judgment as a matter of law. Members of all four subclasses—Sections 1231, 1226(a), 1226(c), and 1225(b)—should be afforded bond hearings after six months of detention, consistent with *Rodriguez II*. The procedural requirements of the bond hearings should be consistent with the findings of the Ninth Circuit in *Singh*, and *Rodriguez II*. Additionally, bond hearings should be provided automatically, and plain language no-

tice, in writing, of the bond hearings should be provided to detainees prior to the hearing.

It is further Ordered that Petitioners' motion for summary judgment be, and hereby is, Granted.

It is further Ordered that Respondents' motion for summary judgment be, and hereby is, Denied.

It is further Ordered, Adjudged and Decreed that Judgment be, and hereby is, Entered in favor of Petitioners and against Respondents.

It is further Ordered that Respondents and their agents, employees, assigns, and all those acting in concert with them be, and hereby are, Permanently Enjoined as follows:

1. Respondents shall provide each class member, by the class member's 181st day of detention, with a a bond hearing before an Immigration Judge consistent with the substantive and procedural requirements set forth in this Order and *Casas*, *Singh*, and *Rodriguez II*.

2. The bond hearings shall be recorded or transcribed so that a written record can be made available if an appeal is taken.

3. At least seven days prior to providing any bond hearing conducted pursuant to this Order, Respondents shall provide written notice, in plain language, to the detainee of his or her upcoming bond hearing. For notice to be sufficient, Respondents must take reasonable steps to ensure receipt of the notice by the class member and class counsel.

4. For class members who have already been detained for more than six months as of the date of this order, but who have not yet received a bond hearing pursuant to this Court's preliminary injunction, Respondents shall provide a bond hearing before an Immigration Judge consistent with the requirements of this Order and *Casas*, *Singh*, and *Rodriguez II*, within 30 days of the date of this Order.

5. Within 60 days of the date of this Order, Respondents shall file a status report describing the steps taken to timely identify all current and future class members and to ensure that they receive bond hearings and notice of those hearings. Along with the status report, Respondents shall file under seal (with a copy served on class counsel) a list containing each class member's name and alien number, the date of any scheduled or completed bond hearing, whether the class member is or was represented, the Immigration Judge who conducted or will conduct the hearing, the bond amount set, if any, and whether any appeal has been taken. Respondents shall file and serve an updated status report and class member list every 90 days thereafter until August 1, 2015. The updated reports and lists shall include the information for all class members in detention as of the date of the prior report.

6. If Respondents determine that an individual is not a class member even though that individual (a) is detained in Respondents' custody within the Central District, (b) has been detained by Respondents for six months or longer, (c) is not detained under 8 U.S.C. § 1226a or 8

U.S.C. § 1531-37, and (d) remains detained even though the government does not have present authority to deport that individual, Respondents shall notify class counsel of that individual's circumstances and the reason Respondents believe that individual is not a class member.

7. For class members in detention as of the date of this Order, Respondents shall provide class counsel with notice of class member bond hearings at the same time that they provide notice to class members directly.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Nos. CV-07-03239-TJH(RNBx)
SA CV 11-01287-TJH(RNBx)

ALEJANDRO RODRIGUEZ, ET AL., PETITIONERS

v.

TIMOTHY S. ROBBINS, ET AL., RESPONDENTS

Filed: Sept. 13, 2012

ORDER AND PRELIMINARY INJUNCTION

TERRY J. HATTER, JR., Senior District Judge.

The Court has considered Petitioners' motion for a preliminary injunction, together with the moving and opposing papers.

It is Ordered that the motion be, and hereby is, Granted.

The Court finds that Petitioners have demonstrated a substantial likelihood of success on the merits, that they will suffer irreparable injury in the absence of a preliminary injunction, and that the balance of hardships tip sharply in their favor.

It is further Ordered that Respondents and their agents, employees, assigns, and all those acting in concert with them, are preliminarily enjoined as follows:

1. Within thirty days of the date of this order, Respondents shall identify all members of the Section 1225(b) and Section 1226(c) Subclasses and provide each of them with a bond hearing before an Immigration Judge with power to grant their release. The Immigration Judge shall release each Subclass member on reasonable conditions of supervision, including electronic monitoring if necessary, unless the government shows by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight.

2. The bond hearings shall be recorded, so that transcriptions will be available in the event of any appeal.

3. Within thirty days of the date of this Order, Respondents shall develop a system to timely identify all future Subclass members and ensure that they receive such bond hearings.

APPENDIX F

1. 8 U.S.C. 1225 provides in pertinent part:

Inspection by immigration officers; expedited removal of inadmissible arriving aliens; referral for hearing

(a) Inspection

(1) Aliens treated as applicants for admission

An Alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission.

* * * * *

(3) Inspection

All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.

* * * * *

(b) Inspection of applicants for admission

(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled

(A) Screening

(i) In general

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.

(ii) Claims for asylum

If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).

(iii) Application to certain other aliens

(I) In general

The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in sub-clause (H) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.

(II) Aliens described

An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.

(B) Asylum interviews

(i) Conduct by asylum officers

An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.

(ii) Referral of certain aliens

If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.

(iii) Removal without further review if no credible fear of persecution

(I) In general

Subject to sub-clause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.

(II) Record of determination

The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's anal-

ysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.

(III) Review of determination

The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).

(IV) Mandatory detention

Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.

* * * * *

(C) Limitation on administrative review

Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.

(D) Limit on collateral attacks

In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).

* * * * *

(2) Inspection of other aliens

(A) In general

Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission,

if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.

(B) Exception

Subparagraph (A) shall not apply to an alien—

(i) who is a crewman,

(ii) to whom paragraph (1) applies, or

(iii) who is a stowaway.

(C) Treatment of aliens arriving from contiguous territory

In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

(3) Challenge of decision

The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien whose privilege to be admitted is so challenged, before an immigration judge for a proceeding under section 1229a of this title.

2. 8 U.S.C. 1226 provides in pertinent part:

Apprehension and detention of aliens

(a) Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) of this section and pending such decision, the Attorney General—

(1) may continue to detain the arrested alien; and

(2) may release the alien on—

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

* * * * *

(c) Detention of criminal aliens

(1) Custody

The Attorney General shall take into custody any alien who—

(A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,

(B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,

(C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[1] to a term of imprisonment of at least 1 year, or

(D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

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[1] So in original. Probably should be "sentenced".

(2) Release

The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

3. 8 U.S.C. 1231(a) provides in pertinent part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United

States within a period of 90 days (in this section referred to as the "removal period").

(B) Beginning of period

The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

(C) Suspension of period

The removal period shall be extended beyond a period of 90 days and the alien may remain in detention during such extended period if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General

release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

* * * * *

4. 8 U.S.C. 1101(a)(13) provides:

Definitions

(a) As used in this chapter—

* * * * *

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from

the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

5. 8 C.F.R. 236.1 provides in pertinent part:

Apprehension, custody, and detention

* * * * *

(c) *Custody issues and release procedures*—

* * * * *

(8) Any officer authorized to issue a warrant of arrest may, in the officer's discretion, release an alien no described in section 236(c)(1) of the Act, under the conditions at section 236(a)(2) and (3) of the Act; provided that the alien must demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding. Such an officer may also, in the exercise of discretion, release an alien in deportation proceedings pursuant to the

authority in section 242 of the Act (as designated prior to April 1, 1997), except as otherwise provided by law.

* * * * *

(d) *Appeals from custody decisions*—(1) *Application to immigration judge.* After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 CFR part 240 becomes final, request amelioration of the conditions under which he or she may be released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of an alien in deportation proceedings) to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in § 3.19 of this chapter. If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.

(2) *Application to the district director.* After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.

(3) *Appeal to the Board of Immigration Appeals.* An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 3.38 of this chapter, the alien or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(ii) The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.

(4) *Effect of filing an appeal.* The filing of an appeal from a determination of an immigration judge or district director under this paragraph shall not operate to delay compliance with the order (except as provided in § 3.19(i)), nor stay the administrative proceedings or removal.

* * * * *

6. 8 C.F.R. 1003.19 provides in pertinent part:

Custody/bond.

(a) Custody and bond determinations made by the service pursuant to 8 CFR part 1236 may be reviewed by an Immigration Judge pursuant to 8 CFR part 1236.

* * * * *

(e) After an initial bond redetermination, an alien's request for a subsequent bond redetermination shall be made in writing and shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination.

* * * * *

(h)(2)(i) Upon expiration of the Transition Period Custody Rules set forth in section 303(b)(3) of Div. C. of Pub. L. 104-208, an immigration judge may not redetermine conditions of custody imposed by the Service with respect to the following classes of aliens:

(A) Aliens in exclusion proceedings;

(B) Arriving aliens in removal proceedings, including aliens paroled after arrival pursuant to section 212(d)(5) of the Act;

(C) Aliens described in section 237(a)(4) of the Act;

(D) Aliens in removal proceedings subject to section 236(c)(1) of the Act (as in effect after expiration of the Transition Period Custody Rules); and

(E) Aliens in deportation proceedings subject to section 242(a)(2) of the Act (as in effect prior to April 1, 1997, and as amended by section 440(c) of Pub. L. 104-132).

(ii) Nothing in this paragraph shall be construed as prohibiting an alien from seeking a redetermination of custody conditions by the Service in accordance with part 1235 or 1236 of this chapter. In addition, with respect to paragraphs (h)(2)(i)(C), (D), and (E) of this section, nothing in this paragraph shall be construed as prohibiting an alien from seeking a determination by an immigration judge that the alien is not properly included within any of those paragraphs.

* * * * *

7. 8 C.F.R. 1003.29 provides:

Continuances.

The Immigration Judge may grant a motion for continuance for good cause shown.